

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
JANE DOE, :
Plaintiff, :
-vs- : Case No. 1:18-cv-614
FAIRFAX COUNTY SCHOOL BOARD, :
Defendant. :
-----:

V O L U M E 7 p.m.

JURY TRIAL PROCEEDINGS

August 6, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

APPEARANCES:

John R. Ates, Linda M. Correia, and Lauren A. Khouri,
Counsel for the Plaintiff

Sona Rewari, Stuart A. Raphael, and Andrea R. Calem,
Counsel for the Defendant

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1 NOTE: The afternoon portion of the trial proceedings
2 on August 6, 2019, begins in the absence of the jury as
3 follows:

4 JURY OUT

5 THE COURT: All right, you wanted to address 801, Mr.
6 Ates?

7 MR. ATES: We do, Your Honor. And what we are asking
8 the Court for is an instruction to the jury that the statements
9 made to the five friends prior to Ms. Doe being told she could
10 be punished for being the victim of a sexual assault, those
11 statements should come in for the truth of the matter asserted.
12 Or, alternatively, that those statements may be considered by
13 the jury in determining credibility.

14 And we've argued this a couple different times, Your
15 Honor. I think the law in the Fourth Circuit is clear,
16 certainly in the context of a criminal case, that a witness
17 must be facing imminent -- I don't want to call it harm, but
18 imminent sanction for -- before the motive to fabricate arises.

19 And we gave you an unpublished case where somebody
20 goes and talks to their attorney, knowing they may be in
21 trouble, and the Court allows that in. As well as another
22 unpublished case as well.

23 If may briefly their Eighth Circuit and Third Circuit
24 cases. Those are criminal cases. We think that's different
25 than here. But in those criminal cases there was an assault

1 victim that the Government was trying to prove a criminal
2 charge, and the defendant said they couldn't testify about what
3 they may have told others.

4 We believe in the civil context, Your Honor, that
5 leads to an improper rule of any sexual assault victim can
6 never tell someone what happened and, in essence, have that
7 state admitted for the veracity of it.

8 There are different concerns that play in a criminal
9 trial where the defendant doesn't have to testify and the
10 burdens are a little bit different.

11 Here, all of the witnesses who were a party, in
12 essence, to the statements testified and were subject to
13 cross-examination, Your Honor.

14 Anything -- if you have any questions, Your Honor, I
15 think --

16 THE COURT: I don't. I think we have briefed it
17 quite a bit. Thank you, Mr. Ates.

18 MR. RAPHAEL: Thank you, Your Honor.

19 In the brief that we filed we had an attachment that
20 had a time line. I don't know if you had a chance to see that.
21 And then each of the entries on the time line were footnoted to
22 where you can find the material in the record.

23 Let me start at the beginning with what 801(d)(1)
24 requires. And the Tome case is very helpful about this. Tome
25 says that the common law rule was that if you are going to use

1 prior consistent statements to rehabilitate a witness, you have
2 to show that the prior consistent statement was made before the
3 issue arose that was the basis for the impeachment.

4 And Tome explains that 801(d)(1)(B) comes along and
5 it codifies one aspect of that rule which relates to motive to
6 fabricate. And the Court holds that -- and this is a gloss on
7 the rule, because it's not in the rule itself. The Court holds
8 in Tome that in order to use 801(d)(1)(B) to get a prior
9 consistent statement in, you have to show that it was made
10 before the duty to -- the motive to fabricate arose. I think
11 everybody is in agreement about that rule.

12 I have to tell you, when I was -- when I read the
13 2014 amendment, which is 801(d)(1)(B)(ii), I was a little
14 confused about what that meant. And then I had sort of an
15 epiphany about what it means after I read a Law Review article
16 on it.

17 The thing that was throwing me was 801(d)(1)(B)(ii)
18 where it says: To rehabilitate the declarant's credibility as
19 a witness when attacked on another ground. And I was scratching
20 my head thinking, what the heck is "another ground."

21 And then I realized, well, another ground -- it's
22 another ground than recent fabrication.

23 And so, you tie this back to Tome, which says, you
24 know, under the common law there were other bases to try to
25 impeach a witness like "you forgot about it," or something like

1 that.

2 And what the notes to the 2014 amendment explain is
3 that the drafters were expanding the rule in 801(d)(1)(B) to
4 include things in addition to recent fabrication. And that's
5 what that "on another ground" means. It's on another ground
6 than recent fabrication.

7 But the notes make it crystal clear that the drafters
8 and the Supreme Court, which promulgated the rule, intended to
9 retain the temporal requirement that the prior consistent
10 statement had been made -- must have been made before the issue
11 arose on which the witness is -- the witness is to be
12 impeached.

13 Now, in some sense I think this is sort of a red
14 herring because I don't believe that Ms. Rewari impeached Jane
15 Doe on any ground other than recent fabrication. She wasn't
16 arguing, you know, she forgot or anything like that.

17 So I think we are not in the 801(d)(1)(B)(ii) box,
18 we're in the 801 -- and, I'm sorry, Mr. Linnell -- we're in the
19 801(d)(1)(B)(i) box. So we're only dealing with recent
20 fabrication. And for that, you have to show that the motive
21 arose -- that the statement was made before the motive arose.

22 Now, there are two -- there are two motives that have
23 been discussed. One is Jane's fear of being disciplined for
24 having engaged in a consensual sexual encounter on a school
25 trip.

1 In footnote -- and then the second motive was she
2 learns that Jack has a girlfriend and she wants to punish him
3 because she is not happy to find that out.

4 We cited in footnote 1 to our chart, which is on ECF
5 301-1, the evidence that we have had so far that showed that
6 she was aware from the outset that she could be punished for
7 engaging in a consensual sexual activity. But I think that she
8 iced it for this issue because she testified yesterday that she
9 was aware that the SR&R prohibits consensual sexual activity.

10 And moreover, the testimony has been consistent that
11 the students are trained on the SR&R every year. They got the
12 -- she got that training every year.

13 So she knew from the outset that being caught in a
14 consensual sexual encounter was -- would be subject to
15 discipline. And that's why, if you go back to our chart now,
16 she knew that before the bus incident even happened. That's --
17 she knew that even no PDA was allowed. And according to one
18 interpretation of the evidence, that's why they had the blanket
19 over them and they weren't kissing, everything happened under
20 the blanket.

21 But -- so all of these prior consistent statements
22 occurred after the motive to fabricate arose.

23 The girlfriend issue I think is a red herring because
24 it is simply an additional motive.

25 The Eighth Circuit case that Mr. Ates says is

1 distinguishable, I don't think it is because the fact, first of
2 all, that it was a criminal case doesn't matter. The rules of
3 evidence are the same. And the Court of Appeals said in that
4 case that the motive to fabricate arose right after the person
5 was leaving the bedroom, right at the outset. And that's
6 really the same that we have here.

7 The other thing I would just finish with is this
8 would be a huge loophole, what they're trying to do, to say if
9 you're attacking a witness' credibility, then all of the prior
10 consistent statements come in. And I think our brief set out
11 well the -- what commentators and courts worry about, that
12 you're just going to let all this stuff in and it's improper to
13 let the jury consider it for the truth of the matter asserted.

14 I also think that an instruction calling attention to
15 it would be particularly prejudicial.

16 So we think the solution is to keep the instruction
17 you have in place. I do think a couple times when you gave
18 it -- and we really appreciate your giving the limiting
19 instruction when you did. A number of times you didn't
20 specifically say, you cannot consider it for the truth of what
21 happened on the bus. And I think that that last phrase is
22 really important because, you know, juries don't know what
23 hearsay is. They need to know that they can't consider the
24 prior consistent statement for the truth of what happened on
25 the bus.

1 Thank you.

2 MR. ATES: If I may briefly, Your Honor.

3 Clearly the night of the assault she calls her
4 friend, and she is telling him it wasn't consensual and she is
5 wondering how to report it to someone. And there is no motive
6 there to lie to her close friend. And you have seen the
7 testimony of her and the testimony on both -- on both accounts.

8 And at that point in time there is no knowledge of a
9 girlfriend. There is no knowledge of her being subject to
10 discipline. There is no knowledge of any administrator knowing
11 about this, or any parent, or anyone other than Aveesh Kachroo.

12 And so, you get to the next morning and there is
13 still no such knowledge and no motive.

14 At best from their side, the girlfriend comes up.
15 But by this point there is a conversation with Aveesh Kachroo
16 and a conversation with Karoline Davis. Those should come in
17 for the truth of the matter asserted.

18 The girlfriend thing, I think the testimony has been
19 very consistent. Jane is concerned about her. She and
20 Karoline are discussing, if we were in this other person's
21 shoes, we would want to know. This goes to Jack Smith's
22 character. And we -- they have a discussion, and ultimately
23 they both tell her.

24 It's not -- there is no evidence about jealousy at
25 all in this case. They were able to cross-examine all of the

1 witnesses who heard about it. None said anything about the
2 girlfriend being some type of improper motive.

3 I think on balance, the testimony clearly is this was
4 a young woman, that something severe happened to her. She was
5 trying to process it. She was trying to figure out what to do.
6 She was seeking help from her very best friends within band.
7 And that's what occurred.

8 So at most it's when the school officials tell her
9 she can be disciplined and she begins to dissolve at that
10 moment, Your Honor.

11 THE COURT: Okay. Well, obviously under Rule 104 I
12 am to look at this issue and decide what the jury can, what the
13 jury can consider in terms of a prior consistent statement
14 coming in as the truth or not.

15 And, you know, the -- and, of course, that requires
16 me to look at the pre-motive requirement. And I think Tome is
17 the governing law, and it requires me to look at whether there
18 were recent fabrications or improper influence or motive.

19 I don't think that there is a credible argument that
20 there was fear of discipline at the time she made the call to
21 Aveesh or to Karoline Davis.

22 The testimony has been that this act occurred on the
23 bus without anybody seeing it, without anybody knowing about
24 it, without anybody observing it, with -- and if you follow the
25 logic of, I better fabricate a story because I'm going to be

1 disciplined, you have to believe that Jane Doe thought somehow
2 that somebody was going to find out. Which is completely
3 inconsistent with the facts of the case. And then she would go
4 around and report it to all of her girlfriends and expose
5 herself to discipline when all she had to do to -- if that was
6 in her mindset, is not say anything.

7 And so, the facts are completely inconsistent with --
8 you know, and I know that they are all educated, but at the
9 time this occurred the idea that she had a fear of discipline
10 immediately afterwards is not supported by the facts.

11 The girlfriend motive, I have got to look at that
12 more closely because of the prior friendship, the prior
13 association. The fact that they had -- you know, they didn't
14 have a date at Homecoming, but they had at least had gone to
15 Homecoming, that Jane Doe had agreed to sit with Jack Smith
16 after dinner, and that she clearly was not afraid of him at
17 that stage and was friendly with him.

18 So I think that there is enough of a -- of a motive
19 there that, being very cautious, I think that we ought to cut
20 off the prior consistent statement testimony offered for the
21 truth with Aveesh Kachroo and Karoline Davis. Because it's
22 also clear from the testimony that Jane Doe had already
23 described to Karoline Davis what had happened before they began
24 discussing the girlfriend.

25 So your exception is noted. I am going to allow the

1 first two statements to be used for the truth.

2 How to fashion an instruction to that effect, I will
3 put something very simple together and we will go and present
4 that to the jury.

5 MR. ATES: Your Honor, may you under 106 also advise
6 for completeness that they can look at the other statements in
7 determining credibility?

8 THE COURT: Don't you think Tome prohibits that?

9 MR. ATES: There is that Fourth Circuit case
10 pre-Tome, Your Honor.

11 THE COURT: Yeah.

12 MR. ATES: I need to make the argument. I would be
13 satisfied, Your Honor, if you instruct on the first two, but I
14 would like to note that was preserved.

15 THE COURT: Okay. Yeah, I am not going to instruct
16 on the credibility issue.

17 Yes.

18 MR. RAPHAEL: Thank you, Your Honor. If I could, I
19 am not going to try to reargue this --

20 THE COURT: Yeah, don't.

21 MR. RAPHAEL: I am not. I am just going to point out
22 that the next -- our case isn't done yet. The next witness,
23 Dr. Gold, had a conversation with this witness that I think
24 bears on this specific issue.

25 So I would ask the Court to just wait until you hear

1 from Dr. Gold. And I would ask permission to revisit it after
2 her testimony.

3 THE COURT: Okay.

4 MR. RAPHAEL: Thank you.

5 THE COURT: All right. Are we ready for our jury?
6 Yes.

7 MS. CALEM: Your Honor, we have one preliminary
8 matter before Dr. Gold.

9 THE COURT: Please.

10 MS. CORREIA: Your Honor, before they bring Dr. Gold,
11 we had two points that we wanted to raise.

12 THE COURT: Okay. Let's hear from Mr. Raphael, and I
13 will give you an opportunity to be heard.

14 MR. RAPHAEL: So I guess we have got three
15 preliminaries. They should be short.

16 One is -- let me take the first one first.
17 Plaintiff's Exhibit 60, these are the Harlow notes that they
18 have -- you said that they could take a look at redacting them.

19 THE COURT: Right.

20 MR. RAPHAEL: They provided -- plaintiffs provided a
21 redacted copy to us this morning, which I had a chance to look
22 at over the lunch break.

23 We still think that these should be excluded. I
24 think the Court should ask the plaintiffs to proffer what it is
25 they think they need from these notes. They are quite lengthy.

1 I think they are cumulative of anything that has already come
2 in under Rule 403. There are at least -- there are over 100
3 references to the plaintiff's name that haven't been redacted
4 yet.

5 And then there are three additional statements that
6 are double hearsay that would have to come out at pages 1529,
7 1530, and 1532.

8 But I think the overarching issue is why are we
9 giving the jury 100 pages of these notes when they had every
10 ability to ask Ms. Harlow what was the basis for her treatment.
11 I just think it is cumulative.

12 THE COURT: They did ask her. And she explained what
13 she had discussed with Jane Doe and what she did in response to
14 that.

15 MR. RAPHAEL: That's exactly right. So 100 pages of
16 notes are not necessary.

17 THE COURT: Okay. Obviously, I can't rule on
18 something I haven't seen yet. So I will need a -- I'll get a
19 copy of 60 and look at it.

20 MR. RAPHAEL: All right.

21 THE COURT: All right. What else?

22 MR. RAPHAEL: The next one is, in the event that we
23 go right from the close of our case to rebuttal, their rebuttal
24 case, Mr. Ates has identified for me a short clip that he wants
25 to read from Dr. Banbury's deposition.

1 THE COURT: Yes.

2 MR. RAPHAEL: And we have asked for five lines before
3 that to be included. I've provided a -- I have a copy for the
4 Court. I provided a thumb drive with the video that has both
5 clips. I just want to make sure that there is no disagreement
6 on that so we don't derail when the jury is in the box.

7 THE COURT: Agreed.

8 MS. CORREIA: We have the clip, Your Honor. We have
9 no problem with it.

10 THE COURT: I am sorry?

11 MS. CORREIA: We have the clip ready and we do not
12 have a problem with it.

13 THE COURT: No, you've -- okay. So it will be played
14 in -- you're not going to try and play your part first and your
15 part second? You will just play it as he answers the
16 questions.

17 MR. RAPHAEL: I think that makes sense. And I think
18 they have it, but Mr. Sapp also has it and can play it on his
19 speakers, whichever the Court prefers.

20 I think there is one more matter with Dr. Gold.

21 THE COURT: Okay. Well, Mr. Ates, you are prepared
22 to put it on on your system, and it is your witness. So --

23 MR. ATES: I can't vouch that our system is as good
24 as theirs, Your Honor, but we will try to have it played.

25 I'm sorry if I was a little flip, Your Honor.

1 THE COURT: No, use either system. And I am sure
2 that won't be a problem.

3 MR. ATES: Thank you.

4 THE COURT: Okay. The third issue.

5 MS. CALEM: Your Honor, with respect to Dr. Gold,
6 before she testifies, we want to be sure that her testimony
7 will comport with the parameters the Court established as to
8 the prior relationship between Smith and Doe.

9 Obviously, per the Court's ruling, she will not be
10 testifying about the improper Snapchat exchanges. However, as
11 a result of her clinical examination of Ms. Doe, she did
12 inquire into and learn about their prior, for lack of a better
13 word, although the plaintiff does not like this, relationship.

14 What she learned is set forth in her report. That
15 they had known each other for many years because they went to
16 the same local pool. They knew -- she told Dr. Gold she had
17 sort of grown up around him, but really didn't get to know him
18 until high school. They were not close. She said she was
19 interested in him romantically at the beginning of freshman
20 year, but nothing happened.

21 And she acknowledged that in the months leading up to
22 the incident on the bus she had in her junior year been
23 interested in him again. And mentioned the Homecoming.

24 And that is the extent of what Dr. Gold would be
25 testifying to.

1 THE COURT: Okay. Mr. Ates, any objection to that?

2 MR. ATES: Your Honor, Ms. Correia is going to handle
3 that if that is acceptable to the Court, please.

4 THE COURT: Certainly.

5 MS. CORREIA: Thank you, Your Honor. This is exactly
6 what we wanted to raise because all of that has been excluded
7 from the case. So it would be improper for Dr. Gold to come in
8 here and discuss that.

9 THE COURT: So what the County knew -- what's the
10 testimony been so far about how long they knew each other?

11 MS. CORREIA: They were just friends, and just what
12 was --

13 THE COURT: Yeah, but there was a temporal period put
14 on that, and I can't remember what it was.

15 MS. CORREIA: The Court's temporal period was six
16 months.

17 THE COURT: That's the one I had suggested, but I
18 think we went back, that they had been in band together. So
19 that takes us a couple years back.

20 What else was testified to previously? I think at
21 this stage Dr. Gold can testify to what was previously in the
22 record. All right.

23 MS. CORREIA: Your Honor, all of that -- that's not
24 evidence that the jury has heard, Your Honor.

25 THE COURT: No, that's what I mean by in the record.

1 Evidence adduced during the trial.

2 MS. CORREIA: The trial.

3 THE COURT: And so, let's get straight what that is.
4 What is your recollection as to how long -- what the testimony
5 has been about the relationship? We have got the Homecoming.
6 We have got they were in band together. And what else do we
7 have?

8 MS. CALEM: Your Honor, there is testimony in the
9 record that they had known each other for three years. That
10 was given to Ms. Hogan. This all came in for notice purposes.

11 We are now on the issue of damages. And Dr. Gold is
12 assessing her damages, her emotional harm in light of the
13 nature and extent of their prior interactions, among other
14 things.

15 THE COURT: I understand that. My question -- did
16 you answer my question?

17 MS. CALEM: Yes, I did. Three years.

18 THE COURT: Three years. Homecoming. Band. You
19 want to also get in the fact that they were at a pool together,
20 a summer swim club or something?

21 MS. CALEM: Yeah. I think her main point that she
22 wants to get across is that she heard in her clinical interview
23 Ms. Doe told Dr. Gold that she liked him intermittently
24 throughout high school. That's it. Liked in a teenage way,
25 nothing more.

1 THE COURT: And that testimony has come in, at least
2 referenced to the junior year, as well. That's already before
3 the jury.

4 MS. CALEM: It has.

5 THE COURT: And we never actually resolved whether
6 there was a problem with that.

7 MS. CORREIA: Your Honor, I am not sure what
8 Ms. Calem meant by "liked in a teenage way." That's not in the
9 record.

10 The problem is that the damages that are sought here
11 flow from the response of the school and not from anything
12 having to do with whatever their interactions were.

13 THE COURT: Well, yeah, I agree. I am going to allow
14 her to testify about the relationship to the extent it's
15 already in evidence in the trial. So you lead her. And that
16 would not include that they were -- she had a romantic interest
17 when she was a freshman. That's just irrelevant.

18 But you can ask about the junior --

19 MS. CALEM: But junior year would be all right?

20 THE COURT: Yeah. Or earlier -- what was it, earlier
21 than junior year, I think?

22 MS. CALEM: Yeah. Ms. Taylor's testimony, I believe,
23 was that she was told by Victoria Staub that the prior year, at
24 least, there was some sort of romantic interest. And that
25 would be Ms. Doe's sophomore year.

1 THE COURT: Right. Okay. You can ask her that
2 question. Okay.

3 MS. CALEM: Thank you, Your Honor.

4 THE COURT: All right.

5 MS. CORREIA: Your Honor, one last thing --

6 THE COURT: Yes.

7 MS. CORREIA: -- related to that is that Dr. Gold
8 sets up a claim by Jane Doe in her report that is not her
9 claim. So we think it's unfair and improper for her to testify
10 to a claim that Jane Doe hasn't made.

11 Specifically, she makes several references to Jane
12 Doe's claims of severe or extreme emotional distress. And that
13 is just not a claim that is present in the case.

14 So we think it's unfair for her to mischaracterize
15 the claim in that way and then shoot it down to say, she didn't
16 think she suffered severe or extreme emotional distress.

17 MS. CALEM: Your Honor, I believe we sort of took
18 care of this in the initial briefing and the Daubert briefing.
19 This goes to the weight of her testimony.

20 The allegations in the complaint are very clear that
21 there is ongoing severe emotional distress that will impair her
22 ability to get a job in the future, will impair her ability to
23 function well going forward.

24 And Dr. Gold is opining on whether or not this -- you
25 know, what is the nature of her emotional distress that she

1 could observe based on her forensic examination and how severe
2 it was.

3 MS. CORREIA: If I may, Your Honor.

4 THE COURT: Yes.

5 MS. CORREIA: The first amended complaint mentions
6 emotional distress three times, paragraphs 55, 82, and 112.
7 And it does not use the word "severe" or "extreme."

8 MS. CALEM: Your Honor, this was addressed also in
9 the argument, the motions and the argument around the Rule 35
10 exam, whether she had placed her mental condition in
11 controversy sufficiently for the exam.

12 THE COURT: Yeah, but what Ms. Correia is saying is
13 that emotional distress is different than severe emotional or
14 extreme distress, and that they have not alleged that.

15 So having Dr. Gold testify to it, and then say it
16 doesn't exist, is putting up a straw argument and then shooting
17 it down.

18 So I am not going to allow that testimony. It's just
19 not -- I haven't heard any testimony --

20 MS. CALEM: Although --

21 THE COURT: I don't know what the other rebuttal
22 expert is going to say, the counselor, but certainly Harlow
23 didn't testify to that. So let's be limited in that.

24 All right.

25 MS. CALEM: Yeah. Your Honor, we had testimony from

1 Ms. Doe's mother that she was destroyed. You know, she was
2 severely -- she was damaged, she couldn't function, she was
3 destroyed.

4 And I think the implication of allegations that she
5 is impaired in earning a living in the future are that she was,
6 you know, severely emotional distressed.

7 THE COURT: Is that alleged --

8 MS. CALEM: That's alleged in the complaint.

9 THE COURT: Is that alleged in the complaint?

10 MS. CORREIA: There is no testimony on that, Your
11 Honor.

12 THE COURT: Well, is it alleged in the complaint?

13 MS. CALEM: Yes, there is loss of future earning
14 capacity and asking for compensation for future psychological
15 care.

16 THE COURT: Okay. I am going to -- I am going to
17 allow it. I think you are right.

18 MS. CORREIA: We can --

19 THE COURT: The facts as testified and some of the
20 e-mails do go beyond just emotional distress and talk about
21 it's very extreme, serious, inability to function.

22 So -- and, you know, in your argument, at the end of
23 the -- closing argument, you can talk about what relief you
24 want and what you're asking for and why you're asking it. But
25 I think that the school has -- should have an opportunity to

1 foreclose an argument that they think might be made.

2 MS. CORREIA: Your Honor, I wouldn't make an argument
3 that wasn't supported by the record. Since we don't have trial
4 testimony on that, I wouldn't make that argument. And I would
5 certainly amend the complaint, if that's necessary, to take
6 that out.

7 THE COURT: Well, no, but it's already in --
8 Ms. Dahlman did testify about how -- and the e-mails also talk
9 about some very extreme mental health issues from that.

10 So I think they are entitled to explore it. If it's
11 not an issue in closing argument, it's not an issue in closing
12 argument. But I think they have a right to make sure it
13 doesn't find its way into the jury's minds.

14 So I will allow it. I apologize for that. Thank you
15 for --

16 MS. CALEM: Thank you, Your Honor.

17 THE COURT: -- identifying that additional testimony.
18 Okay. Are we ready for our jury?

19 All right. Joe, let's get our jury, please.

20 NOTE: At this point the jury returns to the
21 courtroom; whereupon the case continues as follows:

22 JURY IN

23 THE COURT: All right, good afternoon. Have a seat,
24 please.

25 Sorry for the delay. We've been working, though.

1 Okay.

2 All right, next witness.

3 MS. CALEM: Your Honor, we would call Dr. Liza Gold.

4 THE COURT: Okay. Do we have somebody who is getting
5 her?

6 MS. CALEM: She is going to get her. She is on
7 crutches, so it's a little slow going.

8 THE COURT: All right.

9 NOTE: The witness is sworn.

10 THE COURT: Good afternoon, Dr. Gold.

11 THE WITNESS: Hello.

12 THE COURT: All right. Please proceed.

13 MS. CALEM: Thank you, Your Honor.

14 LIZA H. GOLD, called by counsel for the defendant,
15 first being duly sworn, testifies and states:

16 DIRECT EXAMINATION

17 BY MS. CALEM:

18 Q. Good afternoon, Dr. Gold. Can you please give the jury
19 your full name.

20 A. Liza Hannah Gold.

21 Q. What kind of doctor are you?

22 A. I am a psychiatrist.

23 Q. And a psychiatrist is a medical doctor?

24 A. Yes. M.D. degree.

25 Q. And a psychologist does not have an M.D. degree; is that

1 accurate?

2 A. That's correct. Ph.D. or Psy.D. usually.

3 Q. Where you are you licensed to practice medicine?

4 A. Virginia, Maryland, the District of Columbia, New York,
5 and New Jersey.

6 Q. How many years have you practiced medicine as a
7 psychiatrist?

8 A. Almost 30 years.

9 Q. Where is your office?

10 A. In Arlington.

11 Q. Are you here today to talk about Ms. Doe's claims of
12 emotional distress?

13 A. Yes.

14 Q. Are you here today to give any opinion as to whether or
15 not the interaction between Ms. Doe and Mr. Smith was
16 consensual?

17 A. No.

18 Q. Did anyone ask you to give such an opinion in this case?

19 A. No.

20 Q. And in reaching your opinions in this case, did you take
21 into account that either version of the facts could be correct?

22 A. Yes.

23 Q. All right. Thank you. First, I would like to talk to the
24 jury about your background. Can you please turn in the exhibit
25 books to what has been marked as Defendant's Exhibit 150.

1 A. Don't have a book.

2 Q. You will get one.

3 A. Okay, sorry.

4 COURT SECURITY OFFICER: 115, Counsel?

5 MS. CALEM: 1-5-0. I believe it's our second-to-last
6 exhibit at this point.

7 COURT SECURITY OFFICER: 150.

8 A. Okay. I'm there.

9 BY MS. CALEM: (Continuing)

10 Q. All right. Do you recognize Exhibit 150?

11 A. Yes.

12 Q. Can you tell us what it is.

13 A. That is my CV or resumé from October of last year.

14 MS. CALEM: Your Honor, we move to admit Exhibit 150
15 into evidence.

16 THE COURT: Any objection?

17 MS. CORREIA: No objection.

18 THE COURT: Received.

19 BY MS. CALEM: (Continuing)

20 Q. So your CV is quite long, it's more than 20 pages, and we
21 are certainly not going to go over every page of it, but I
22 would like to talk about a few different parts of it.

23 First of all, let's talk about your formal education.
24 Where did you go to college?

25 A. I went to Harvard/Radcliffe College, graduated in 19 -- I

1 was class of 1980. I graduated in 1981.

2 Q. And after college did you do any graduate work?

3 A. I did. I got a Master's degree at the University of
4 Cambridge in England. And then I went to medical school at New
5 York University School of Medicine.

6 Q. And when did you graduate from NYU School of Medicine?

7 A. 1986.

8 Q. Did you then do a residency?

9 A. Yes. I did a residency in psychiatry at Boston
10 University. First I did an internship for one year, and then a
11 three-year psychiatric residency, from which I graduated in
12 1990.

13 Q. And during -- can you just explain to us what exactly a
14 residency is.

15 A. Yeah. A residency is a specialty postgraduate clinical
16 training -- clinical and academic training, but with the
17 emphasis on the clinical.

18 So after, you know, a dozen years of higher
19 education, you have to start doing some practical learning.
20 And that's what a resident -- internship and residency is for.

21 Q. During your residency, did you achieve any positions of
22 distinction?

23 A. Yes. My last year I was a chief resident. I also was
24 selected as a fellow for the Group for the Advancement of
25 Psychiatry, which is sort of an honor, I guess. So, yes.

1 Q. The first page of your CV lists your medical board
2 certifications and memberships. What does it mean to be board
3 certified?

4 A. Board certified means that the specialty at question, you
5 have passed the tests, verbal, oral, and/or both that
6 demonstrates that you're practicing at the highest degree of
7 best practices as -- as judged by that particular -- by experts
8 in that particular specialty.

9 Q. In what areas of medical practice are you board certified?

10 A. General clinical psychiatry and forensic psychiatry.

11 And -- I'm sorry.

12 Q. Go ahead.

13 A. Oh, and in fact, I'm actually on the board for forensic --
14 the forensic psychiatry committee that writes the questions for
15 the tests for forensic psychiatry.

16 Q. Can you just explain to us what forensic psychiatry is.

17 A. Yeah. So forensic psychiatry, broadly speaking, is the
18 application of the principles and practice of forensic
19 psychiatry -- of psychiatry for non-clinical or non-treatment
20 purposes.

21 So it can be analysis, legal consultation, working in
22 an insurance company, for example. All kinds of things.

23 Q. So non-treatment?

24 A. Non-treatment.

25 Q. Are you here today as a forensic psychiatrist?

1 A. Yes, I am.

2 Q. There's also a section on your CV on page 1 called
3 Academic Appointments. Do you teach at any universities?

4 A. Yes. I'm a clinical professor of psychiatry at Georgetown
5 University School of Medicine. And I'm in the process right
6 now of designing a teaching module for the residents in
7 forensic psychiatry.

8 Q. Are you a member of any professional organizations in the
9 field of psychiatry?

10 A. Yes. I'm a member of the American Psychiatric
11 Association, the Washington Psychiatric Society, and I'm
12 incoming president elect of the American Academy of Psychiatry
13 and the Law.

14 Q. And what is the primary focus of the American Academy of
15 Psychiatry and the Law?

16 A. It's the professional organization for forensic
17 psychiatrists, primarily in the United States, but we also have
18 international members. And the purpose of that organization is
19 education.

20 Q. Does the American Psychiatric Association have a
21 publishing arm?

22 A. Yes, it does.

23 Q. And has that organization published any books that you
24 have written or edited?

25 A. Yes.

1 Q. What books are those?

2 A. Well, there's one coming out in the spring, which is the
3 third edition of the *Textbook of Suicide Risk Assessment and*
4 *Management*.

5 A couple years ago I was the editor of the third
6 edition -- well, I've been the editor of all the editions of
7 the *Textbook of Forensic Psychiatry*, which is one of only two
8 textbooks on that, general textbooks on that subject. A
9 textbook on *Gun Violence and Mental Illness*. Textbook on
10 *Sexual Harassment, Evaluations in Litigation*.

11 Q. Are these textbooks used in residency programs?

12 A. I hope so.

13 Q. Have you -- have you also published articles in the field
14 of forensic psychiatry?

15 A. Yes.

16 Q. And these are all listed in your CV?

17 A. Yes.

18 Q. All right. We do not need to run through all of them.

19 On page 3 of your CV there's one publication that I
20 would like to call attention to it, and it's entitled *Sexual*
21 *Harassment of Women: Climate, Culture, and Consequences in*
22 *Academic Sciences, Engineering, and Medicine*, which was
23 published in June 2018.

24 Very briefly, can you tell us about your work on this
25 publication.

1 A. Yes. I was part of a committee selected by the National
2 Academy of Sciences, Engineering, and Medicine to work on a
3 research study, and then be part of the publication process for
4 the results of that research and our recommendations on how to
5 address our findings regarding sexual harassment in academia,
6 primarily science, STEM subject, science, technology,
7 engineering, and medicine.

8 Q. Thank you. Page 6 of your CV has a section entitled
9 Journal Affiliations. Do you edit certain journals, medical
10 journals?

11 A. I have been the associate editor or on the editorial
12 review board of various journals and publishing. I'm on the
13 editorial board for the American Psychiatric Publishing,
14 Incorporated, the publishing arm of the American Psychiatric
15 Association.

16 But also I've been on -- I've been an associate
17 editor or on the editorial board of a variety of other
18 journals.

19 Q. And do you also function as a peer reviewer for medical
20 articles?

21 A. Primarily psychiatric. Occasionally more medical than
22 psychiatric, but, yes.

23 Q. Briefly in one or two sentences, if you could explain what
24 peer review is.

25 A. Peer review is an essential part of the scientific process

1 where typically if someone writes an article or conducts
2 research and wants to have it published, it is sent to
3 recognized experts in that field for them to read over and
4 comment on and address whether it meets specific kinds of
5 scientific standards.

6 If it's a research article, there might be
7 statistical standards. For other subjects, there might be
8 other kinds of standards. There's a variety of standards for
9 any individual article.

10 Q. Do you do any work with the District of Columbia Mental
11 Health Commission?

12 A. Yes, I'm a member of the commission.

13 Q. What's the function of the commission?

14 A. The District of Columbia Mental Health Commission, which I
15 believe is part of the Superior Court of the District of
16 Columbia, I get them confused, I'm sorry, handles involuntary
17 commitment petitions in the District of Columbia on -- whether
18 they're inpatient or outpatient.

19 So we conduct the hearings to see whether someone
20 should or shouldn't be involuntarily committed.

21 Q. Thank you. Now --

22 A. Or whether we recommend that they be involuntarily
23 committed. The Court decides whether they should.

24 Q. Understood. Aside from your teaching and writing, have
25 you also had a private practice in which you treat patients?

1 A. Yes.

2 Q. Do you still see private patients at this time?

3 A. Not at this moment.

4 Q. For what period of time did you see private patients?

5 A. From 1992 until about April of this year.

6 Q. And you also have a private forensic practice, correct?

7 A. That is correct.

8 Q. And in your clinical practice with patients, as well as
9 your forensic practice, would you say that you have an area of
10 specialty?

11 A. Yes.

12 Q. What would that be?

13 A. Post-traumatic stress disorder, personal injury, diagnoses
14 associated with those. That would be both clinical and
15 forensic. But clinically mood disorders, anxiety disorders,
16 and post-traumatic disorders, also personality disorders.

17 Q. When you say "post-traumatic disorders," do you include
18 trauma as a result of sexual abuse?

19 A. Yes. Well, yes, because in women that is actually the
20 most common kind of post-traumatic -- is the most common reason
21 for post-traumatic disorders.

22 Q. Over the last 30 years or so of your practice, can you
23 estimate the number of women you have evaluated, whether as a
24 treating doctor or as a part of your forensic work, who have
25 experienced sexual assaults?

1 A. Well, "sexual assault" is a very broad term. But
2 including everything under the umbrella of what could be
3 considered a sexual assault, it's probably between 6 and 800
4 women.

5 Q. Have you evaluated adolescents who claim to have
6 experienced sexual assault?

7 A. Yes.

8 Q. And can you explain for us briefly in your area of
9 specialty what the difference is between your forensic work and
10 your clinical work, your treatment work.

11 A. Yes, forensic work is I evaluate people, usually people
12 involved in litigation, whether criminal or civil, and I don't
13 provide treatment.

14 In my clinical practice, I provide treatment. Or I
15 provided treatment.

16 Q. In your treatment practice, have you evaluated and treated
17 adolescents who have experienced severe trauma as a result of
18 claimed sexual assault?

19 A. Yes.

20 Q. Are you familiar with the research and literature on the
21 fight-flight-freeze response to a traumatic event?

22 A. Yes, it's the basis of most post-traumatic theory, stress
23 theory.

24 Q. Are you familiar with the concept of secondary
25 victimization in the context of a sexual assault?

1 A. Yes. In the context of sexual assault and other types
2 of -- other types of events, yes.

3 Q. Based on your training and experience, are you
4 knowledgeable about the ways in which adolescents process
5 adverse events in their lives?

6 A. Yes, if by that you're asking am I aware of some of the
7 developmental issues that can affect how they process adverse
8 events or traumatic events.

9 Q. When you're working as a forensic evaluator, are you able
10 to go outside the therapeutic relationship to gather
11 information?

12 A. You're ethically required to.

13 Q. What type of information do you typically look for when
14 you're doing a forensic consult?

15 A. I ask to review legal records, medical records,
16 psychiatric records, counseling records, school records, social
17 media. Pretty much -- sometime tax records. Sometimes
18 military records. As many contemporaneously-generated records
19 as I can. Any other reports by other experts.

20 Q. And what is the purpose for looking at all of those
21 records?

22 A. To try to come to an opinion based on as many facts as I
23 can gather about someone's emotional or mental state at
24 whichever time I am asked to evaluate.

25 Q. And you would not undergo the same exercise, would you, in

1 your capacity as a treating doctor?

2 A. It would be unethical to do that for the most part.

3 Q. And why is that?

4 A. Confidentiality is the cornerstone of the therapeutic
5 relationship. And a therapeutic relationship is basically
6 between the treatment provider and the client or the patient.
7 And the therapeutic relationships are based on that rapport.
8 And that rapport is developed as a result of, hopefully, trust
9 on both sides.

10 And so, treatment providers almost, almost
11 exclusively rely on self-report, except in unusual
12 circumstances.

13 Q. Let's move on to the work that you did in this case. Did
14 review records as part of your work in this case?

15 A. Yes, I did.

16 Q. About how many hours did you spend reviewing these
17 records?

18 A. Oh, 35 to 40, I think.

19 Q. So let's look at some of the specific records and
20 materials you may have reviewed. Did you review the legal
21 documents in this case?

22 A. Well, I don't know if I reviewed all of them, but I
23 reviewed many legal documents in this case.

24 Q. You reviewed the complaint and the answer, did you not?

25 A. Yes.

1 Q. And you reviewed interrogatory answers?

2 A. Yes.

3 Q. And you reviewed a number of deposition transcripts?

4 A. Many, yes.

5 Q. Including the deposition of the plaintiff, Ms. Doe?

6 A. Yes.

7 Q. Did you review the deposition testimony of her parents?

8 A. Yes.

9 MS. CORREIA: Objection, Your Honor.

10 THE COURT: Overruled.

11 MS. CORREIA: May we approach?

12 THE COURT: Yes.

13 NOTE: A sidebar discussion is had between the Court
14 and counsel out of the hearing of the jury as follows:

15 AT SIDEBAR

16 MS. CORREIA: I understood the testimony --

17 THE COURT: Okay, hold on. What's the objection?

18 MS. CORREIA: I understood the testimony is supposed
19 to be based on the trial record and not the deposition record.

20 THE COURT: No. No, I wasn't trying to make that
21 statement. I think she can -- what are you afraid of coming
22 out in --

23 MS. CORREIA: I am not afraid of anything coming out.
24 I am afraid that the jury should be making a decision based on
25 the trial record. And the expert's opinion should be based on

1 the trial record evidence, and not things that the jury hasn't
2 heard.

3 MS. CALEM: Your Honor, I am trying to lay a
4 foundation to qualify her and to offer her as an expert. And
5 in order to do that, I want her to say what she did in her
6 forensic capacity.

7 THE COURT: Yeah, I'm going to allow it. Your
8 exception is noted.

9 MS. CALEM: And plus, there is a rule on witnesses.
10 We did not tell her what other witnesses said.

11 THE COURT: Right. No, this will be permitted.

12 NOTE: The sidebar discussion is concluded; whereupon
13 the case continues before the jury as follows:

14 BEFORE THE JURY

15 THE COURT: Please proceed.

16 BY MS. CALEM: (Continuing)

17 Q. Let's see. When we left off, Dr. Gold, I believe I was
18 asking you about the deposition testimony that you reviewed.
19 And I don't need you to reiterate all the deposition testimony.
20 I just want to know whether you reviewed the depositions of the
21 plaintiff's parents?

22 You did that, did you not?

23 A. Yes.

24 Q. And did you interview -- read the deposition testimonies
25 of the people involved in the investigation in this case?

1 Mr. Baranyk --

2 A. Yes.

3 Q. -- Calvello. Ms. Hogan?

4 A. Yes, yes.

5 Q. Did you review any written statements given by Ms. Doe's
6 high school friends?

7 A. Yes.

8 Q. Did you review Ms. Doe's academic records?

9 A. Yes.

10 Q. And why were those important?

11 A. In young adults -- teenagers, young adults, college-age
12 students, when they are experiencing emotional distress,
13 particularly severe emotional distress, one of the places that
14 you see that reflected is in academic functioning often.

15 And so, that can provide corroborating evidence or
16 information regarding how -- regarding their reports,
17 subjective reports of distress.

18 Q. Did you review Ms. Doe's medical records, including the
19 records of her treating therapists?

20 A. Yes.

21 Q. Did you review communications between Ms. Doe and her
22 friends from around the time of the bus incident in March 2017
23 and in the year following?

24 A. I reviewed quite a few social media texts. I don't know
25 if they are all of them, but I reviewed quite a number of them.

1 Q. And what is the importance of those types of
2 communications?

3 A. Well, those are particularly valuable because they are, A,
4 contemporaneous; and, B, tend to be unfiltered. Which is why
5 all of us get in trouble with them. So they often get fired
6 off in the heat of a moment and can give you insight into how
7 that person is feeling at that moment.

8 Q. And do forensic psychiatrists typically rely on all of
9 these types of documents in conducting their evaluations?

10 A. These and, depending on the case, more, yes.

11 MS. CALEM: Your Honor, at this point I would like to
12 move to offer Dr. Gold as our expert witness.

13 THE COURT: For purposes of testimony about --

14 MS. CALEM: For purposes of testimony regarding the
15 plaintiff's emotional distress.

16 THE COURT: All right. Any objection?

17 MS. CORREIA: I didn't hear a specificity about the
18 expertise for purposes of this case.

19 THE COURT: No, that's -- those are based on the
20 questions she has been asking for the last ten minutes.

21 I am going to permit her to testify about the
22 emotional distress of Jane Doe.

23 Go ahead.

24 BY MS. CALEM: (Continuing)

25 Q. Dr. Gold, as part of your forensic evaluation, did you

1 meet with Ms. Doe?

2 A. Yes, I did.

3 Q. Is this a standard part of your forensic evaluation?

4 A. When possible, yes.

5 Q. And why is this something important to do?

6 A. It's a standard part of psychiatric evaluation, whether
7 it's clinical or forensic. It allows you not only to hear the
8 person's subjective experience, which is extremely important,
9 it also allows you to flesh out information that you've
10 reviewed in the documents and make your own objective
11 observations of that person's emotional state, again at that
12 moment in time.

13 Q. How long did you meet with Ms. Doe for?

14 A. Two hours.

15 Q. Is this a standard amount of time for an evaluation of
16 this sort?

17 A. Not, not typically for me. Although evaluating
18 adolescents usually is on the shorter side, between two and
19 four hours. Hers was two hours, which is a little on the
20 shorter side.

21 Q. Can you explain why you believe it was a little on the
22 shorter side?

23 A. There were certain areas that Ms. Doe was not particularly
24 responsive about, certain questions that she was not
25 particularly responsive about.

1 And so, it curtailed the length of time because there
2 were just subjects that weren't discussed, or weren't discussed
3 very much.

4 Q. Nonetheless, based on all of the work that you did, were
5 you confident that you had all of the information you needed to
6 arrive at your opinions about Ms. Doe's emotional distress
7 within a reasonable degree of medical and psychiatric
8 certainty?

9 A. Yes.

10 Q. So let's go to the issue of Ms. Doe's emotional distress.

11 Is it your opinion that Ms. Doe has experienced
12 severe, long-lasting emotional distress as a result of the
13 actions of the School Board?

14 MS. CORREIA: Objection.

15 THE COURT: Overruled.

16 A. My opinion is that she has not.

17 BY MS. CALEM: (Continuing)

18 Q. And is it your opinion that Ms. Doe has experienced
19 emotional distress that rises to the level of a psychiatric
20 disorder as a result of the actions of the School Board?

21 A. My opinion is that she has not.

22 Q. And are those opinions held within a reasonable degree of
23 medical and psychiatric certainty?

24 A. Yes, they are.

25 Q. So let's start with the fact of emotional distress. Would

1 you agree that Ms. Doe did experience some emotional distress
2 as a result of the incident that occurred on the bus?

3 A. Yes.

4 Q. So let's look at that incident itself. First of all, in
5 speaking to Ms. Doe, did you have an understanding of her --
6 the history of her interactions with Mr. Smith within the
7 last -- the year or two prior to the incident?

8 A. Yes, I believe I did.

9 Q. What was your understanding?

10 A. They had known each other. They were peers. They were
11 friends. They had -- they belonged to the same swim club.
12 They were in band together. And Ms. Doe reported that at least
13 at one point she had had some romantic interest in him.

14 Q. Was that romantic interest, did she say --

15 MS. CORREIA: Objection.

16 THE COURT: I will strike that answer. Ask your next
17 question.

18 BY MS. CALEM: (Continuing)

19 Q. In the -- strike that.

20 What did Ms. Doe tell you about the history of her
21 interactions with Mr. Smith?

22 A. There had been an element of romantic interest --

23 MS. CORREIA: Objection, Your Honor.

24 MS. CALEM: Your Honor --

25 THE COURT: Approach the bench, please.

1 NOTE: A sidebar discussion is had between the Court
2 and counsel out of the hearing of the jury as follows:

3 AT SIDEBAR

4 MS. CALEM: I'm sorry, Your Honor. I'm not trying to
5 go beyond the Court's ruling. I thought I was complying with
6 what we discussed.

7 THE COURT: What's your objection?

8 MS. CORREIA: The objection is it was an opened-ended
9 question about their history --

10 THE COURT: Yeah. The question suggests that they
11 had a mutual romantic interest. And that's not the testimony
12 that we've heard.

13 The testimony has been that Jane Doe admitted she had
14 an interest. I'm not sure -- is "romantic" the right word?

15 MS. CORREIA: Maybe adults have used that word. The
16 lawyers, I should say.

17 THE COURT: That she was interested in him at one
18 period, but it wasn't a romantic interest.

19 MS. CALEM: Can I ask the question, did she indicate
20 she had an interest in him at any point?

21 THE COURT: I think that that --

22 MS. KHOURI: I think it has to be time limited, not
23 open it up as if it could be at any point in time.

24 MS. CALEM: I limited it to the year, as we discussed
25 in our earlier conference, before this exam. I did limit it to

1 the year or so before the incident.

2 MS. CORREIA: I think the question was what did Doe
3 tell you about the history of her interactions with Smith.
4 That was too broad.

5 THE COURT: So what I want you to do is lead her so
6 she can give a yes or no answer and just say: Did she tell you
7 that she had had an interest in him in a year or so before this
8 incident.

9 MS. CALEM: All right.

10 THE COURT: Okay?

11 MS. CALEM: Can I ask about freshman year, or is
12 that --

13 MS. CORREIA: No.

14 MS. CALEM: I thought we had talked about that.

15 MS. CORREIA: Sorry, Your Honor. Stay in my lane.

16 MS. CALEM: To quote you, Linda, you are not judge
17 and jury.

18 THE COURT: Yeah, let's leave it right where that is,
19 just ask that one question. Thank you.

20 NOTE: The sidebar discussion is concluded; whereupon
21 the case continues before the jury as follows:

22 BEFORE THE JURY

23 BY MS. CALEM: (Continuing)

24 Q. Dr. Gold, did Ms. Doe tell you that she was at any time
25 interested in Mr. Smith in the year leading up to the bus

1 incident?

2 A. In a non-platonic way, yes. And not necessarily
3 consistently --

4 THE COURT: I'm sorry. Just listen to the question
5 and answer the next question.

6 THE WITNESS: I'm sorry.

7 THE COURT: Thank you.

8 THE WITNESS: Sorry, Your Honor.

9 BY MS. CALEM: (Continuing)

10 Q. So what are -- let's go to your opinions about Ms. Doe's
11 emotional distress during the band trip. I want to focus on
12 that period of time.

13 What is your opinion about the emotional distress --
14 her emotional distress at that time?

15 A. I think Ms. Doe was emotionally distressed in a --
16 primarily as a -- well, Ms. Doe was emotionally distressed.

17 Q. And what -- based on the facts you have reviewed and your
18 conversation with her, what do you believe the reason for that
19 distress was?

20 A. The primary reason appears to have been that she became
21 very upset upon discovering that Mr. Smith had a girlfriend.

22 Q. Do you know how she learned this information?

23 A. I believe in the course of confiding in a friend that she
24 was not sure if she was entirely comfortable with what had
25 happened on the bus, that she was not sure that it was entirely

1 okay or consensual or -- again, it's very hard to characterize,
2 but this friend advised her that he had a girlfriend.

3 Q. And what is the basis of your belief that Ms. Doe became
4 upset by that information?

5 A. That's when her texts blew up. And the focus of the texts
6 and the other information -- contemporaneous information I saw
7 over the next few days centered on her distress, anger, upset
8 that Jack Smith was cheating.

9 Q. Can I ask you, please -- and you will get the book -- can
10 you turn to Plaintiff's Exhibit 82.

11 A. Can I add something?

12 Q. No, wait until I ask.

13 MS. CALEM: Your Honor, I believe this has been
14 admitted into evidence. May I publish the first page to the
15 jury?

16 THE COURT: Yes.

17 BY MS. CALEM: (Continuing)

18 Q. Dr. Gold, have you seen this exchange of text messages?

19 A. Yes.

20 Q. And is this information that you considered in arriving at
21 your opinion about Ms. Doe's emotional distress?

22 A. Yes. Her emotional distress at this point in time.

23 Q. Okay. And tell us, what is it about this exchange of text
24 messages that indicates to you emotional distress relating to
25 Mr. Smith having a girlfriend?

1 MS. CORREIA: Objection. Your Honor, may we
2 approach?

3 THE COURT: Yes.

4 NOTE: A sidebar discussion is had between the Court
5 and counsel out of the hearing of the jury as follows:
6 AT SIDEBAR

7 MS. CORREIA: Sorry, Your Honor. The Court's order
8 is that the expert will not be allowed to testify directly
9 about the credibility of other witnesses or the credibility of
10 the facts of the case. And that's what she is doing,
11 interpreting the evidence.

12 MS. CALEM: No. This is not credibility. This is --
13 she is simply saying, based on the evidence that she reviewed,
14 her impression is that this was a source of emotional distress.
15 This was in her report. You challenged this in the Daubert
16 motion. And she was admitted. And you knew that this was her
17 opinion.

18 MS. CORREIA: It's the role of the jury to decide
19 whether she suffered emotional distress in this case and the
20 degree of it.

21 THE COURT: She is allowed to point out facts that
22 support her position that she believes the emotional distress
23 is a result of the finding out about the girlfriend.

24 Now, whether it's believable or not, but there is
25 evidence to that fact. So that ruling does not exclude the

1 ability to highlight different pieces of information that she
2 looked at. So I don't think it violates that part of the order
3 that I entered previously.

4 MS. CORREIA: Thank you, Your Honor.

5 THE COURT: Okay.

6 NOTE: The sidebar discussion is concluded; whereupon
7 the case continues before the jury as follows:

8 BEFORE THE JURY

9 BY MS. CALEM: (Continuing)

10 Q. Do you remember the question, Dr. Gold?

11 A. Could you repeat it, just to --

12 Q. Let's see if I remember it. We're looking at Plaintiff's
13 Exhibit 82, and there is a text exchange here between Ms. Doe
14 and her friend Aveesh. And you said that this is one of the
15 documents, pieces of information, that you reviewed in arriving
16 at your opinion about her emotional distress on the band trip.

17 My question to you is, what is it about this exchange
18 that supports your opinion that the girlfriend was a source of
19 emotional distress while on the band trip?

20 A. I would reframe it. Not necessarily the girlfriend, it's
21 the fact that there had been this contact between them and
22 afterward she discovered that he had a girlfriend.

23 So the first thing is, in all caps, HATE HIM. And
24 that's -- I'm sorry, that's 7:22.

25 And then her friend responded: What happened?

1 And at 7:24 there is a narrative text -- you don't
2 want me to read it, do you?

3 Q. You don't need to read it.

4 A. Okay. So what it indicates is that in response to finding
5 out about this girlfriend, Ms. Doe confronted Mr. Smith about
6 having a girlfriend and insisting that he tell the girlfriend
7 what had happened between her -- between Ms. Doe and Mr. Smith
8 on the bus.

9 And she reports that Mr. Smith texted her back, told
10 her that he had told his girlfriend, but that Ms. Doe had
11 observed them -- and I believe this was again -- she was not at
12 the same school, but she was on the same band trip with another
13 school, that's why she was there. And she didn't -- she saw
14 them walking by and holding hands and she became very angry.

15 And she says: There is no way he told her the whole
16 story and he said he would, they were holding hands.

17 And that, to her, indicated, quote: There is no way
18 she would forgive him.

19 So she believed he hadn't, either hadn't told her or
20 hadn't told her the whole thing or, I don't know, but not to
21 her satisfaction.

22 Q. You can take that down.

23 What is -- you referenced the use of the word
24 "cheating" before. What is the significance of that word?

25 A. Well, "cheating" is a word that comes up in the context of

1 non-platonic interest in people. It's not a word that I have,
2 in my experience, heard used in the context of a sexual
3 assault. Women who are assaulted aren't usually, in my
4 experience, worried whether the perpetrator is married,
5 engaged, any -- about their personal life. It's not relevant
6 to the fact that they were just assaulted. That's what's
7 relevant to them.

8 So the fact that the subject of hate him, and he
9 didn't tell his girlfriend, and he said he was going to tell
10 his girlfriend, to me that's the telling emotional content
11 here.

12 Q. How, if at all, did you factor in Ms. Doe's reports to her
13 friends about this incident?

14 A. Well, whatever -- again, I don't know what happened on the
15 bus. And I think that Ms. Doe was processing that, and she
16 wasn't entirely sure exactly what happened on the bus.

17 But in trying to work that through and talking to her
18 friends about it, she was given this information. What that
19 tells me is that as she was trying to work it through, at least
20 part of the totality of the circumstances was that -- and,
21 again, I don't know what happened, but at least prior to the
22 event or events that made her question what was going on, it
23 included her having something more than a non-platonic interest
24 in him.

25 Q. Did you factor in the observations of Ms. Doe's friends

1 during the trip that she reported feeling unwell?

2 A. Yes.

3 Q. And what did you make of those observations?

4 A. She was upset. She was very upset.

5 Q. Would you agree that adolescents tend to report traumatic
6 events relating to peer relationships to their friends rather
7 than to adults?

8 A. Yes.

9 Q. Is there anything else about -- any other factor relating
10 to the bus trip itself that you considered in arriving at your
11 opinion regarding Ms. Doe's emotional distress at that point in
12 time?

13 A. You know, up to whatever happened after the blanket had
14 been taken out, the interaction between the two of them was a
15 consensual interaction at least --

16 MS. CORREIA: Objection.

17 THE COURT: Sustained. Strike that last answer.

18 MS. CALEM: Okay. I apologize, Your Honor, this
19 is --

20 THE COURT: You just started off by saying she wasn't
21 going to offer any opinion --

22 MS. CALEM: No, she is -- no. She is not intended to
23 offer any opinion on consent.

24 THE COURT: Well, it sounded like that may have been
25 what she was saying. So you are to disregard that opinion.

1 BY MS. CALEM: (Continuing)

2 Q. Okay. Did you understand that Ms. Doe had agreed to sit
3 next to Mr. Smith on the bus?

4 A. I understood that he had specifically asked her if he
5 could sit next to her. That she agreed. And that this
6 actually necessitated some rearrangement of seating.

7 Q. Let's move to after the band trip.

8 Was there another point after the band trip during
9 which you, in your opinion, observed Ms. Doe experiencing acute
10 emotional distress?

11 A. Yes.

12 Q. And when was that?

13 A. That was following being asked to report to the school
14 officials what happened.

15 Q. What information did you have to support your belief about
16 that?

17 A. A couple of significant things. The first one was, again,
18 a text that was immediately sent to a friend about concern
19 about that she was going to be disciplined, either expelled or
20 suspended, I think.

21 But even -- again, the most significant piece of
22 evidence for me was her father's report of her calling him
23 afterwards, and she was so distraught that she could barely
24 talk. And that he -- what he gathered from what she was saying
25 to him was that she might get expelled from school and that

1 was -- or suspended, and that was overwhelming at that moment
2 in time.

3 Q. Do you have an understanding as to how long that acute
4 emotional distress lasted?

5 A. Well, Ms. Doe was advised about 48 hours later that there
6 was not going to be any discipline against her. So that would
7 have resolved the acute distress issue in regard to discipline.

8 She might still have had some distress over the fact
9 that it happened because it was unpleasant, but there was no
10 longer fear that there would be a severe consequence.

11 Q. Now let's look at the remainder of that school year.

12 Based on your forensic evaluation, what are your
13 opinions about Ms. Doe's level of emotional distress for the
14 remainder of the school year based on the information that you
15 reviewed?

16 A. By -- certainly by the end of the school year Ms. Doe's
17 distress had for the most part resolved. There were still some
18 issues in the following weeks about contact with Jack Smith in
19 band class. Those were resolved by the end of the month.

20 And at that point there is no evidence of ongoing
21 acute or severe emotional distress other than subjective
22 reports.

23 Q. What type of evidence are you looking for as a forensic
24 psychiatrist to show the existence of ongoing emotional
25 distress?

1 A. Well, there is two, given Ms. Doe's age, primarily two.
2 One is a change in social functioning. And the other is a
3 change in academic function.

4 Q. And what did you learn about her academic functioning for
5 the rest of her junior year?

6 A. Ms. Doe had been a higher than 4.0 grade point average
7 student. And she continued to be a higher than a 4.0 grade
8 point average student.

9 You know, with very bright people, including very
10 bright teens, you know, sometimes they might -- people might
11 say, oh, they went from an A to a B, so that's okay. But what
12 I look at is whether there is any significant change. An A
13 student who becomes a B student, to me that's a significant
14 indicator of some impairment for some reason.

15 Her grades stayed between 4.0 and 4.2, I believe
16 between 4.1 and 4.2. She was taking two or possibly three AP
17 classes. This was a very high powered, you know, committed
18 high school student. And her -- she did well.

19 Q. Did you consider Ms. Doe's extracurricular activities in
20 arriving at your opinions about her emotional distress for the
21 remainder of that school year?

22 A. Yes. To the extent that I could identify them. And the
23 only one of which I was really appeared -- because when you're
24 taking two or three AP classes and getting a 4.2 or 4.1 grade
25 point average, you probably don't have a huge amount of time

1 for extracurricular activities. But the one that Ms. Doe had
2 been committed to was band. And she continued to participate
3 in band. And there does not appear to have been any change in
4 her functioning or level of participation.

5 Even on the band trip, she participated in all the
6 activities, as far as I could tell, despite the fact that she
7 was upset.

8 Q. Did Ms. Doe tell you that she felt uncomfortable in band
9 after this incident because of Mr. Smith's presence?

10 A. Yes.

11 Q. And how did that factor into your analysis?

12 A. Well, she had clearly been upset with him, you know, on
13 the band trip. So -- and on top of that, there had been this
14 adverse experience. Ms. Doe did not directly report this to
15 the school. Somehow it got reported to the school through the
16 grapevine of people that had been informed.

17 And so, I don't know that she was necessarily
18 expecting there to be -- to be put on the spot about what
19 happened and have her parents involved and potentially be
20 looking at disciplinary action.

21 So I'm sure that she was not -- she was uncomfortable
22 looking at Jack Smith at that point.

23 Q. Did you factor in Ms. Doe's college application process to
24 your thinking about her functioning after the band trip?

25 A. I'm not sure I understand the question.

1 Q. Were you aware that she was accepted at William & Mary?

2 A. Yeah. I don't think that was until later in the year. I
3 mean, I don't think that was until her senior year, right?

4 Q. Okay.

5 A. But she -- but in terms of college functioning, she --
6 over the summer, which is, again, after the school year, she
7 was very involved in college application process. She went on
8 12 -- I think she went to see 12 colleges in 10 days. She
9 participated in band camp. I believe she ran for a leadership
10 role or wanted a leadership role in band. I don't think she
11 got it, but I believe she tried to.

12 These are -- these are indications that her
13 functioning -- there is no evidence of impaired functioning
14 that I could find.

15 Q. What about the fact that Ms. Doe began seeing a therapist
16 in June of 2017, how did that factor into your conclusion that
17 there was no impaired functioning?

18 A. Well, one doesn't have to have impaired functioning to go
19 see a therapist. And to the -- I am not sure entirely that
20 Ms. Doe had at that point been able to process all these
21 events. And she -- there is nothing, nothing surprising about
22 her going to see a therapist.

23 The part that leads me to believe that it's not a
24 result of acute emotional distress was the fact that these
25 incidents happened in March and she didn't see the therapist

1 until -- until sometime in June. So it was a good two to
2 three months -- I'm not remembering the exact dates, but two to
3 three months after the events in question.

4 Meanwhile, she had completed her classes, engaged in
5 her activities, et cetera, and done well.

6 So, again, social functioning, academic functioning,
7 were okay, not impaired. No evidence of impairment.

8 Q. Did you form any assessment as to Ms. Doe's ability to
9 self-advocate in academics and in her social life?

10 A. Ms. Doe has the capacity to self-advocate.

11 Q. And what is the basis for that statement?

12 A. She confronted Jack Smith. She confronted Jack Smith's
13 girlfriend, a young woman that she did not know about
14 Jack Smith's activity, encounter, the incident on the bus -- I
15 am not sure what words to use for that.

16 She became very angry at the end of the school year
17 when Jack Smith was given a band award, and she immediately
18 confronted the band teacher, who obviously is not a peer, about
19 the inappropriateness of giving Jack Smith an award given her
20 complaints about him.

21 She -- so those are three instances of self-advocacy
22 that occurred within -- both immediately and within the short
23 term range after the events on the bus.

24 Q. Have you read the report of one of Ms. Doe's therapists in
25 which she opines that the incident on the bus and the incidents

1 following and the events following have impaired Ms. Doe's
2 ability to -- in her relationships with boyfriends?

3 MS. CORREIA: Objection.

4 THE COURT: Approach the bench.

5 NOTE: A sidebar discussion is had between the Court
6 and counsel out of the hearing of the jury as follows:

7 AT SIDEBAR

8 MS. CORREIA: She is asking about a therapist's
9 report. There isn't a therapist's report.

10 THE COURT: A couple of letters, is that what you're
11 referring to?

12 MS. CORREIA: There was a clinical file.

13 MS. CALEM: Is your objection to the terminology of
14 "report" rather than "clinical file"? There is an expert
15 disclosure which she read in which you said that Ms. Kerley
16 would be opining that her relationships with her boyfriends
17 were affected. And the plaintiff herself testified to that
18 yesterday.

19 MS. CORREIA: That's in rebuttal. It hasn't come
20 yet.

21 MS. CALEM: But she read all that information and she
22 read the Kerley file.

23 MS. CORREIA: So that the disclosure that you are
24 referring to, you are talking about the report?

25 MS. CALEM: I don't --

1 MS. CORREIA: You just asked about a therapist's
2 report. And I am objecting that there isn't a therapist's
3 report.

4 THE COURT: Okay.

5 MS. CALEM: Therapist's files.

6 THE COURT: So the import is whether she should be
7 allowed as to testify whether she believes that the events that
8 occurred would affect her ability to have relationships in the
9 future. Is that what you're asking?

10 MS. CALEM: I don't want to go broad brush with this.
11 She just talked about one boyfriend, and that's all I want to
12 ask about. And there were some text messages admitted into
13 evidence yesterday that go to that issue. That's all I want to
14 ask her about.

15 THE COURT: All right. You may ask it. Clean up the
16 reference to the file versus a report.

17 MS. CALEM: Yes, Your Honor.

18 MS. CORREIA: Thank you, Your Honor.

19 THE COURT: Okay. Thank you.

20 NOTE: The sidebar discussion is concluded; whereupon
21 the case continues before the jury as follows:

22 BEFORE THE JURY

23 BY MS. CALEM: (Continuing)

24 Q. Dr. Gold, I misspoke when I said "report."

25 Did you review any materials from either of Ms. Doe's

1 treating therapists which refer to difficulty she had with a
2 high school boyfriend and the connection between that and the
3 incident on the bus?

4 A. Yes.

5 Q. What was your understanding of what the treating therapist
6 said about that?

7 A. That Ms. Doe's relationship in her senior year with
8 another young man in school, that she had difficulty with that
9 due to issues of trust. And that's really the primary one that
10 I can recall.

11 Q. Did you, yourself, ask Ms. Doe about this in your clinical
12 interview?

13 A. Yes, I did.

14 Q. And what was her response?

15 A. Her response was that the events with Jack Smith had not
16 affected that relationship.

17 Q. Did you review any text message exchanges between Ms. Doe
18 and a friend that relate to this high school boyfriend?

19 A. Yes.

20 Q. Did the information in -- did those text messages furnish
21 you with any information that is relevant to your opinions in
22 this case?

23 A. Yes.

24 Q. What was that?

25 A. Those text messages took place in March and April. So --

1 of 2018. So one year later. And Ms. Doe was complaining that
2 the boyfriend had been -- I don't know if "ignoring" is the
3 right word, but I think blowing her off is kind of how I would
4 think about it. That she had ask him, in one text she said ten
5 times to hang out or do something. And he wasn't doing it, not
6 putting an effort. And, you know, she wasn't sure what was
7 going on, whether they were still going out or they weren't
8 going out, and maybe they were breaking up or not breaking up.
9 That she still loved him, but he wasn't a good boyfriend. That
10 information.

11 And subsequently, I guess, as this relationship
12 deteriorated or followed its natural course to its end, one of
13 her friends reported to her that he had had a conversation with
14 this boyfriend who said that they had broken up, at least for
15 one reason, was that he was becoming emotionally closer to
16 other people rather than her.

17 And Ms. Doe again had the reaction that mirrored the
18 reaction of one year previously when she found out that Jack
19 Smith had a girlfriend.

20 Q. And what reaction was that?

21 A. Well, the first -- one of the first things she said was, I
22 hate him. And he cheated on me. And her friend tried to
23 assure her that he didn't think that he had really cheated on
24 her. And Ms. Doe insisted that he was a horrible human being
25 and that he had lied to her. And said that she felt, I

1 believe -- first of all, she was clearly heart broken, okay,
2 which -- you know, I mean, you feel for people.

3 But that she also was angry and felt humiliated,
4 especially -- that was the later -- that was later in April
5 because apparently he started dating or going out with someone
6 else. And again, she reported how it was breaking her heart
7 every time she saw them together and made her feel humiliated
8 and angry.

9 Q. So if you could please turn in the Defendant's Exhibit
10 book to 152.

11 And I do not intend to publish this to the jury, Your
12 Honor. Yeah, it is in evidence.

13 Dr. Gold, if you could take a look at Defendant's
14 Exhibit 152.

15 A. Okay.

16 Q. And scan that and let me know if this is the text exchange
17 you are talking about in discussing this relationship.

18 MS. CORREIA: Objection, Your Honor.

19 THE COURT: Do you have 152 in evidence?

20 THE CLERK: Yes, I do.

21 THE COURT: Okay. What's your objection? I'm sorry.

22 MS. CORREIA: Foundation.

23 THE COURT: Overruled. I'll allow it. Let's not --
24 she has already testified about what she drew from the
25 document.

1 MS. CALEM: I'm just having her confirm that this is
2 what she looked at, that's all.

3 THE WITNESS: Yes, this is the document.

4 THE COURT: Okay.

5 THE WITNESS: Or one of them.

6 BY MS. CALEM: (Continuing)

7 Q. Thank you. You may put that aside.

8 A. There were others, but this is one.

9 Q. All right. With regard to the diagnosis of adjustment
10 disorder with which Ms. Doe's treating therapists -- that
11 Ms. Doe's treating therapist gave her, can you comment on your
12 views as to the appropriateness of that diagnosis?

13 A. I found no evidence that Ms. Doe's emotional upset
14 distress rose to the level that met the criteria in the
15 Diagnostic and Statistical Manual, which is the -- lists all
16 the criteria and categories for psychiatric disorders, that she
17 met the criteria for any psychiatric disorder, including an
18 adjustment disorder.

19 Regardless of the causation, what the DSM requires
20 for that diagnosis is emotional symptoms outside those which
21 would be expected or beyond those which would be expected for
22 that -- for the event that has ostensibly caused them, and/or a
23 significant impairment in functioning. Specifically, again, in
24 adolescents or teens, change in social relationships or
25 academic functioning.

1 Q. So we have already talked about your conclusions with
2 regard to Ms. Doe's academic functioning. In the therapeutic
3 records that you reviewed there was discussion of, according to
4 the therapists, certain social impairments, loss of friends,
5 changes in some relationships.

6 How does that factor into your thinking about whether
7 or not there was social impairment sufficient to meet the
8 diagnosis of adjustment disorder?

9 A. You know, to the extent that that is part of the
10 developmental trajectory of teenagers, it's not unusual. In
11 the context of an adverse event that's being seen as a black
12 and white issue, you're either with me or you're against me,
13 you either believe me or you don't believe me, that's the kind
14 of thing that's going to create some turbulence in social
15 relationships.

16 And I think that what you saw -- what happened was
17 the kind of turbulence you're going to see after the kind of
18 adverse events that took place, but they didn't rise at that
19 time in the three months following the events to meet the
20 criteria of a psychiatric diagnosis.

21 That's not to say that Ms. Doe was not upset and
22 didn't have periods when she felt very, very badly or very
23 angry or whatever. But she -- she didn't miss school. She
24 didn't miss band. She maintained a number of her friendships.
25 She -- you know, she did what she had to do in terms of both

1 functioning and she didn't become isolated, she didn't stay in
2 bed all day, et cetera.

3 There's a number of things that you see in terms of
4 social or academic functioning in people with severe
5 symptomatology that just were not in evidence here.

6 Q. What about the fact that Ms. Doe resumed seeing a
7 therapist in the spring of 2018, I believe, and basically with
8 one gap has continued on and off to this day, does that suggest
9 to you that there is an appropriate diagnosis of adjustment
10 disorder with anxiety?

11 A. If there is, it's not related to these events. Because,
12 again, by definition, an adjustment disorder typically
13 resolves -- its onset is within three months of an identifiable
14 stressor, and it typically resolves within six months of the
15 consequences of that stressor.

16 It becomes a little more complicated when people
17 engage in litigation because then you can't ever -- you can't
18 entirely let go of it, the litigation keeps it alive and adds
19 additional stress.

20 But that doesn't necessarily mean that it's a
21 continuation of a previous adjustment disorder.

22 Q. Does litigation in and of itself create a type of stress?

23 MS. CORREIA: Objection.

24 THE COURT: Sustained.

25 BY MS. CALEM: (Continuing)

1 Q. Were you able to determine based upon your forensic
2 evaluation what effect the litigation had on Ms. Doe's
3 emotional distress?

4 MS. CORREIA: Objection.

5 THE COURT: Sustained. If she asked Jane Doe whether
6 she was stressed from the litigation, I think you can ask her
7 that. But otherwise, let's move on.

8 BY MS. CALEM: (Continuing)

9 Q. Did you discuss with Ms. Doe whether or not she was upset
10 about the litigation?

11 A. I did not specifically ask that question.

12 Q. All right. Were you able to determine if there were other
13 sources of emotional distress in Ms. Doe's life unrelated to
14 this incident and the school's response?

15 A. There were to the extent that, again, these were to some
16 degree normal developmental sources of stress that are common
17 to people who are about to -- who are very driven, who are very
18 responsible, who have high goals for themselves. And that can
19 create quite a bit of anxiety.

20 The idea of leaving home and going to college can
21 create quite a bit of anxiety. Applying to college can be a
22 very stressful process.

23 And all of these are reflected in the therapist's
24 notes from both the summer of 2017 and then again in 2018.

25 MS. CALEM: Thank you. One moment, Your Honor, if I

1 may have the Court's indulgence.

2 THE COURT: Yes.

3 MS. CALEM: I would just like to -- it has been
4 brought to my attention that Plaintiff's Exhibit 82, there's a
5 slight discrepancy as between Defendant's Exhibit 59, and that.
6 Both are admitted into evidence.

7 BY MS. CALEM: (Continued)

8 Q. Could you please look at Defendant's Exhibit 59.

9 Can you bring up Defendant's Exhibit 59, please, Mr.
10 Sapp?

11 And I really --

12 A. I'm looking at 82. Did you want me to see 82 or 59?

13 Q. Defendant's 59.

14 A. Oh, I am sorry.

15 Q. Side by side.

16 MS. CORREIA: Your Honor, can we approach?

17 THE COURT: They're the same content, one runs longer
18 than the other one?

19 MS. CALEM: No, there's word missing from 82.

20 THE COURT: Okay. So what is the purpose of asking
21 her to compare them?

22 MS. CALEM: I wanted -- I want to make sure she saw
23 the complete version, that's all.

24 THE COURT: Okay. That she have saw 59?

25 MS. CALEM: Yes.

1 THE COURT: Okay. I'll permit that. You don't have
2 to put them up side by side. Thank you.

3 BY MS. CALEM: (Continuing)

4 Q. So in Defendant's Exhibit 59, the words --

5 THE COURT: Do you want to point out the word that
6 isn't in the other?

7 MS. CALEM: Yeah. If you would put up 59.

8 THE COURT: All right. I understand. Yes, you can
9 put them up. Sorry.

10 MS. CALEM: Thank you.

11 BY MS. CALEM: (Continued)

12 Q. One says: HATE HIM. And one says: I Hate Him.

13 In capital letters?

14 A. Yes.

15 Q. Okay. Did you see Defendant's Exhibit 59?

16 A. I saw the one that says: I hate him.

17 Q. All right. And that is the one upon which you relied in
18 forming your opinion?

19 A. Yes.

20 MS. CALEM: Nothing further.

21 THE COURT: Okay.

22 MS. CALEM: Thank you, Your Honor.

23 THE COURT: All right. Cross-examination.

24 CROSS-EXAMINATION

25 BY MS. CORREIA:

1 Q. Hello, Dr. Gold.

2 A. Good afternoon.

3 Q. The materials that you reviewed before rendering your
4 report with your opinions in this case were all provided to you
5 by the School Board's attorneys, right?

6 A. Yes.

7 Q. And did you review the sworn declarations provided by
8 other students who were in the band?

9 A. I you reviewed five sworn declarations.

10 Q. And you disregarded those, right?

11 A. It's not that I disregarded them. I looked at them and
12 weighed their content and what they added to my opinion.

13 Q. And in your view, they contradicted your view that
14 Jane Doe did not suffer emotional distress because of the
15 school's response to her, right?

16 A. The statements -- some of -- I don't recall -- I would
17 have to look specifically at each one of them, but I don't
18 recall specifically. They were more -- they certainly had
19 information in them about these students' experiences in
20 reporting to the School Board. But I don't recall specific
21 content about Ms. Doe's distress relating to the School
22 Board -- or the investigation, I'm sorry.

23 Q. This is --

24 A. I'm happy to review those specifically and let you know if
25 I'm misremembering.

1 Q. Sure. This isn't the first time you've testified in
2 court, right?

3 A. No, it is not.

4 Q. And you've testified before?

5 A. Yes.

6 Q. Would you tell the jury how many times.

7 A. Oh, my goodness. I probably testify in trials two time
8 times a year, maybe. So over 25 years -- 50 seems like a lot,
9 but maybe it's as much as that. Depositions way more than
10 trial testimony. But trials, one or two a year.

11 Q. Okay. And every time you testified, you were paid to do
12 so, right?

13 A. I'm paid for my time by -- whether I testify or not. And
14 I don't testify in many cases I'm retained in.

15 Q. You get paid whether you testify or not?

16 A. I get paid for the time I spend rendering services,
17 whether those services include testimony or they do not include
18 testimony.

19 Q. The defendant is paying you \$6,000 to testify in court
20 today, right?

21 A. No, not exactly correct.

22 Q. You're not paid \$6,000 for one day of testimony?

23 A. I am, but I'm not charging them for a whole day today.

24 Q. Did you charge them for a whole day yesterday when you
25 were waiting to testify?

1 A. No.

2 Q. Have you sent a recent invoice to the defendant's counsel
3 in this case?

4 A. Yes.

5 Q. And isn't it true that you estimated that you would be
6 charging them \$6,000 to testify yesterday when you were
7 supposed to testify?

8 A. I did, but I anticipated testifying last Wednesday, and
9 events have overtaken my estimate. That's why it's an
10 estimate.

11 MS. CORREIA: May I hand this up, Your Honor?

12 MS. CALEM: Your Honor, we object.

13 THE COURT: On the bill? I don't know what this is.
14 So it's hard for me to -- why don't we approach the bench,
15 please.

16 MS. CALEM: Your Honor, this is a letter.

17 THE COURT: Okay. Come to the bench, please.

18 NOTE: A sidebar discussion is had between the Court
19 and counsel out of the hearing of the jury as follows:

20 AT SIDEBAR

21 MS. CORREIA: This is the invoice that we just got
22 yesterday.

23 THE COURT: Okay. Well, what's the rest of it? Are
24 you trying to admit this, or do you just want her to say --

25 MS. CORREIA: I want to refresh her, and then I'll be

1 offering it, yes. That's her invoice.

2 MS. CALEM: Your Honor, this is not -- I mean, she
3 hasn't testified inconsistently. There's nothing to impeach
4 her on here. She can certainly refresh her recollection with
5 it on the fees.

6 MS. CORREIA: She said she's not billing \$6,000 a
7 day, and it says right there that she is.

8 MS. CALEM: She said the events have overtaken the
9 bill.

10 THE COURT: You may use the document to refresh her
11 recollection. I don't see any reason to admit the document
12 itself, unless she denies it. If she does, then the document
13 goes in. Okay. Thank you.

14 NOTE: The sidebar discussion is concluded; whereupon
15 the case continues before the jury as follows:

16 BEFORE THE JURY

17 THE COURT: Do you want to take a break? I'm sorry.
18 Let's take 15 minutes, and we'll come back and continue with
19 the testimony. I've run over and I didn't realize it. I
20 apologize.

21 NOTE: At this point the jury leaves the courtroom;
22 whereupon the case continues as follows:

23 JURY OUT

24 THE COURT: All right, let's take 15 minutes.

25 MR. ATES: Thank you, Your Honor.

1 THE COURT: All right. We're in recess.

2 NOTE: At this point a recess is taken; at the
3 conclusion of which the case continues in the absence of the
4 jury as follows:

5 JURY OUT

6 THE COURT: Any preliminary matters?

7 All right. Joe, let's get our jury, please.

8 NOTE: At this point, the jury returns to the
9 courtroom; whereupon, the case continues as follows:

10 JURY IN

11 THE COURT: All right. Please have a seat.

12 Please continue, Ms. Correia.

13 MS. CORREIA: Thank you, Your Honor.

14 BY MS. CORREIA:

15 Q. Dr. Gold, is it true that you have billed the defendant
16 more than \$50,000 for this case so far?

17 A. I think it's, it's about 50. It might be a little bit
18 more, but it's about 50.

19 Q. And the School Board's paying you \$600 an hour, right?

20 A. \$600 an hour is my fee, regardless of who retains me.

21 Q. And -- but it was the defense who retained you in this
22 case, right?

23 A. In this matter, I was retained by the defense.

24 Q. And you knew that you'd be rendering a report in this
25 case, right?

1 A. Not necessarily.

2 Q. When you addressed your report in this case, you sent it
3 to the defense attorneys, right?

4 A. I'd have to look and see if I addressed it specifically to
5 them or not. Sometimes I address it to the attorneys, and
6 sometimes I don't.

7 Q. You didn't send it to Jane Doe's counsel, did you?

8 A. No, but when you say address, I -- I'm sorry, I sent it --
9 I definitely sent it to them. I don't know if it was addressed
10 specifically to them.

11 Q. You sent it to them, and part of preparing it was talking
12 to them about your review of the information, right?

13 A. Before I prepare a report, I talk to the attorneys about
14 my findings and what they're based on. If the -- if they feel
15 that my opinions are helpful to their case, they typically ask
16 me to write a report. If my opinions are not helpful, they may
17 ask me not to write a report.

18 Q. And in this case, they did ask you to write a report,
19 right?

20 A. Yes.

21 Q. Because they wouldn't have asked you to write a report if
22 they thought you weren't helping them, right?

23 A. My intent was not to help the attorneys. It was to
24 develop opinions. If they wanted a report of those opinions,
25 that's part of what I'm prepared to do.

1 Q. Now, you talked a little bit about the information that
2 you reviewed in coming to your opinion. You first met Jane Doe
3 on March 4, 2019, right?

4 A. I believe that's correct. I'd have to look at my report
5 to refresh my memory about the date, but it was March.

6 Q. It's not pretty, but I'm happy to hand you my copy if you
7 want to refresh yourself on the date.

8 A. That's fine. Either way. I mean, I'm -- the day I
9 evaluated her was the first day I met her.

10 Q. Do we have the date right?

11 A. Yes.

12 Q. Okay. I'll take that back. Thank you.

13 And, Dr. Gold, March 4, 2019, was two years after
14 Jack Smith sexually assaulted Jane Doe, right?

15 A. It was two years after the incident on the bus. I don't
16 know how to characterize it, so I can't say it was two years
17 after the assault.

18 Q. It was two years after the school closed its investigation
19 of the assault, right?

20 A. Same -- I don't know exactly when the school closed its
21 investigation. I know that their findings that no one was
22 going to be disciplined were delivered to Ms. Doe on the
23 Wednesday. And the Monday was when they had first spoken to
24 her.

25 I don't -- again, I don't know -- I'm hesitant to

1 agree to the use of the word "assault" because I don't know
2 that that's -- I don't know that it didn't happen; I don't know
3 that it did happen.

4 Q. You didn't review any information that the school took any
5 action related to an investigation other than that Monday when
6 they interviewed Jane Doe and Jack Smith, right?

7 MS. CALEM: Objection.

8 THE COURT: Yeah, sustained.

9 BY MS. CORREIA:

10 Q. Did you interview [sic] any information that showed that
11 the investigation went beyond that Monday?

12 MS. CALEM: Objection, Your Honor.

13 THE COURT: A little different question. I'll allow
14 the question.

15 THE WITNESS: I'm sorry, could you repeat the
16 question? I'm sorry.

17 BY MS. CORREIA:

18 Q. Did you, did you review any information that showed that
19 the school continued its investigation beyond that Monday?

20 A. I did not see any information from the school that was
21 dated after the Monday.

22 Q. Okay. And so when you met Jane Doe on March 4, 2019, it
23 was just about two years after the school closed its
24 investigation on March 13, 2017, right?

25 A. I don't mean to, to quibble with the question. I'm

1 just -- I don't know when they closed the investigation. I
2 didn't see any additional information after the Monday.

3 When I met with Jane Doe, it was two years after the
4 events that are in question in the litigation, to my
5 understanding.

6 Q. You reviewed Kathryn Harlow's clinical notes, right?

7 A. Correct.

8 Q. And those were the contemporaneous notes of her treatment
9 of Jane Doe?

10 A. That's my understanding, yes.

11 Q. And those were her notes taken during her therapeutic
12 sessions with Jane Doe, right?

13 A. If by "during" you mean -- I don't believe they were taken
14 while they were sitting there, but shortly thereafter, so yes.

15 Q. Do you have a reason to believe -- to disbelieve any
16 representation that Ms. Harlow took those notes during her
17 therapeutic sessions?

18 A. No, I don't. I'm just saying that different therapists do
19 things different ways, and some write during the session, and
20 some write immediately afterwards, but they're contemporaneous
21 regardless.

22 Q. Okay. So those were contemporaneous notes. You'll agree
23 to that?

24 A. I consider them contemporaneous.

25 Q. Okay. And you weren't present for those sessions two

1 years ago, right?

2 A. No.

3 Q. And -- so you didn't observe Jane Doe while Ms. Harlow met
4 with her, right?

5 A. No.

6 Q. And you didn't see Jane Doe's emotion as she told
7 Ms. Harlow in 2017 about what happened to her on the bus, did
8 you?

9 A. No, I did not.

10 Q. And you didn't hear Jane Doe's emotion in 2017 when she
11 told Ms. Harlow that Jack Smith digitally penetrated her, did
12 you?

13 A. No, I didn't.

14 Q. And you didn't hear her emotion when she described how he
15 grabbed her hand and used her hand to touch his penis, did you?

16 A. No, I did not.

17 Q. And you didn't hear from two years ago Jane Doe describe
18 the movie playing in her head as she recounted the sexual
19 assault to Ms. Harlow, did you?

20 A. Since I didn't -- no, but again, I -- I don't know that it
21 was an assault. I know that's how she characterizes it. I
22 know that that's part of the questions here. But I didn't
23 observe her emotions at any point in recounting anything to
24 Ms. Harlow.

25 Q. Right. And you didn't observe her emotions when she

1 recounted in 2017 that same movie playing in her head when she
2 described the nightmares that she had of school officials,
3 right?

4 A. No.

5 Q. And you saw in the notes that she had talked about those
6 nightmares and about those emotions, right?

7 A. I saw that she mentioned nightmares, yes.

8 Q. Okay. And you didn't hear from Jane Doe's mouth in 2017
9 her trying to understand why she froze in the moment, did you?

10 A. I'm sorry, could you repeat that one?

11 Q. You didn't hear from Jane Doe's mouth in 2017 her trying
12 to understand why she froze in the moment?

13 A. I didn't meet Ms. Doe until March 2019, so no.

14 THE COURT: Now, you've --

15 MS. CORREIA: I'm moving on.

16 THE COURT: Let's move on.

17 BY MS. CORREIA:

18 Q. Now, you had a chance to do a psychiatric evaluation of
19 Jane Doe on March 4, 2019, right?

20 A. Correct.

21 Q. And in fact, the School Board got a court order requiring
22 her to see you for that purpose, right?

23 A. That's my understanding.

24 Q. And you were hired to evaluate her emotional harm in this
25 case, right?

1 A. I was asked to come to opinions about whether there had
2 been emotional harm.

3 Q. Right. And you weren't providing any treatment, right?

4 A. No, I was not.

5 Q. And specifically, the purpose of your exam, as the School
6 Board put it to you, was to come to psychiatric opinions
7 regarding Ms. Doe's claim of psychiatric injury related to the
8 response of Oakton High School personnel to reports of a
9 possible sexual assault against Ms. Doe, right?

10 A. Yes.

11 Q. And that was what the defendant's lawyers asked you to do?

12 A. Well, let me -- let me back up. It was -- there was that
13 piece of it, and then there was also the piece about the School
14 Board investigation.

15 Q. Right. And you spent two hours with Jane Doe, right?

16 A. I did.

17 Q. And you weren't limited in the questions you could ask,
18 right?

19 A. Limited how?

20 Q. In any way.

21 A. Well, I was -- what I could ask was not limited, no.

22 Q. Right. And you could have spent up to four hours with
23 Jane Doe, but you chose not to, right?

24 A. There was no more information I felt that -- to be had at
25 the time I --

1 Q. You didn't ask to meet with Jane Doe's family members, did
2 you?

3 A. I didn't ask to, no.

4 Q. Because it wasn't relevant to your job, right?

5 A. No.

6 Q. Now --

7 A. I'm not typically allowed -- generally at this point, I
8 don't ask to interview third parties because I'm typically not
9 given access to third parties such as parents, friends, etc.
10 They're under no obligation to come and speak with me.

11 Q. Right. You were given access to what the defendant's
12 lawyers gave you, right?

13 A. No. When you're talking about talking to other people,
14 very few people want to come in and talk -- it may come as a
15 surprise, but very few people want to come in and talk to a
16 psychiatrist under these circumstances, and Ms. Doe herself
17 only did so after a court order. Other people are not required
18 to do that.

19 And at this point, I could go through the motions of
20 asking, please let me -- please arrange for me to see so-and-so
21 and so-and-so, but I don't anymore because the answer has
22 always been no.

23 Q. Right. So you agree that Jane Doe did not want to come in
24 and talk to you that day, right?

25 A. It's clear that Ms. Doe did not want to come in and

1 undergo a psychiatric evaluation. I don't know -- I doubt it
2 was with me specifically. It could have been.

3 Q. Right.

4 A. But it -- I think any psychiatrist retained by the
5 defendant would -- she, I assume, would have had the same
6 stance.

7 Q. Right. And despite all of that, your testimony a little
8 while ago is that she came in for two hours, having never met
9 you before, and told you that she was interested in Jack Smith
10 in a non- -- in a -- I lost the word -- in a non-platonic way?
11 That's your testimony?

12 A. She did tell -- well, she didn't use the word
13 non-platonic. I don't know that --

14 Q. Oh, she didn't?

15 A. No. I don't know what word I'm supposed to use because
16 I keep, you know -- but, but she was interested at one point in
17 a relationship with Jack Smith. She was romantically
18 interested in Jack Smith at one point.

19 Q. She didn't tell you that?

20 A. Yes, she did.

21 Q. Now, you also didn't look at information from teachers
22 that Jane Doe had in the spring of 2017, did you?

23 A. I did see some information from teachers.

24 Q. And you didn't take into account one of her teachers who
25 said that she wasn't 100 percent during that time period,

1 right?

2 A. I don't know what you're referring to. I'd be happy to
3 refresh my memory by taking a look at it.

4 Q. Did you, did you consider the, the deposition of one of
5 her teachers by the name of Ms. London?

6 A. I don't recall specifically. I would have to look at my
7 report to refresh my memory to see whether I saw that document.

8 Q. And if Ms. London said that there was definitely a visible
9 change in Jane Doe's behavior in that 2017 period after March,
10 you didn't consider that, right?

11 A. I would have to take a look at the document and -- to
12 refresh my memory about whether I saw it or not.

13 Q. And you didn't take into account her view that Jane Doe
14 seemed a little more anxious and a little more withdrawn during
15 that period either, did you?

16 A. I would not be surprised if that was true. I don't know
17 that I saw that particular deposition, but she was -- she had
18 gone through an experience that was upsetting.

19 Q. And if you didn't see that deposition, it's only because
20 the defendant didn't share it with you, right?

21 A. If I didn't see it, I don't know why I didn't see it, but
22 I --

23 THE COURT: She doesn't know whether she saw it or
24 not, so let's move along.

25 BY MS. CORREIA:

1 Q. Did you take into account the deposition of Jane Doe's
2 teacher, Ms. Brady?

3 A. Yes.

4 Q. And Ms. Brady said that Jane Doe's walls went up after
5 what happened, right?

6 A. I -- yes. I believe those were the words, but I -- again,
7 I would want to -- and again, when someone goes through an
8 upsetting and adverse experience, it does have reverberations.
9 Those do not necessarily mean that someone has a psychiatric
10 disorder or -- we're all the result of our experiences. They
11 affect us.

12 I'm sure she was affected by what she went through.
13 That doesn't take it to a psychiatric diagnostic level.

14 Q. So your diagnosis in 2019 was, was something else, right?
15 Mental health diagnoses are listed in the *Diagnostic and*
16 *Statistical Manual of Mental Disorders*, right?

17 A. Which -- that's two questions, I'm sorry.

18 Q. Let me take one question.

19 A. Please.

20 Q. Mental health diagnoses are listed in the *Diagnostic and*
21 *Statistical Manual of Mental Disorders*, right?

22 A. That's correct.

23 Q. And the current edition is known as *DSM-5*, right?

24 A. That's correct.

25 Q. And the *DSM-5* is the diagnostic tool published by the

1 American Psychiatric Association for mental health disorders,
2 right?

3 A. It's the diagnostic classification of the American
4 Psychiatric Association. It's pretty much accepted in the
5 United States, and now it's congruent with Europe and other
6 places, but yes.

7 Q. Right. And your, your opinion in this case, your
8 diagnosis in this case, having met Jane Doe, was that Jane Doe
9 experienced something called transient emotional distress,
10 right?

11 A. That's not a diagnosis.

12 Q. No, it isn't, is it?

13 A. No.

14 Q. It's not a term that you'll find in the *DSM-5*, is it?

15 A. No. It's a paraphrase of the differential diagnosis for
16 normative stress reaction or normative emotional distress
17 that's part of the differential for adjustment disorder.

18 Q. Is that something that you find in the *DSM-5*?

19 A. Yes.

20 Q. Can you show us where?

21 A. If you can give me a copy, I'll be happy to show it to
22 you.

23 Q. The differential diagnosis for an adjustment disorder?

24 A. Yes.

25 Q. Wasn't that your own phrase?

1 A. I did paraphrase because I don't -- I felt that transient
2 emotional distress was easier to understand than the term
3 that's in the *DSM*, but it's essentially the same term.

4 Q. But you introduced this in your deposition to us as
5 something that you came up with yourself, didn't you?

6 A. Right. The paraphrase is my term, but the concept is in
7 the *DSM-5*.

8 Q. But the phrase "transient emotional distress" is not a
9 psychiatric diagnosis, is it?

10 A. Neither is "normative stress reaction." It's not a
11 psychiatric diagnosis. It's just a phrase in the, in the book.

12 Q. There's no diagnosis of normative stress reaction in this
13 case, is there?

14 A. I'm sorry, I -- it's not a diagnosis, so you can't make
15 it. The differential for an adjustment disorder is that you
16 shouldn't -- it's -- the reason it's there is that people are
17 cautioned not to make a diagnosis that -- of the presence of a
18 psychiatric disorder just because someone is having a reaction
19 to an upsetting experience.

20 If all of us develop psychiatric disorders every time
21 something adverse or upsetting happened to us, we'd all be
22 walking around with psychiatric disorders. It has to reach a
23 clinically significant level.

24 Q. Okay. Well, you had the opportunity to look at
25 Ms. Harlow's notes and how she came to that diagnosis, right?

1 A. Ms. Harlow's notes don't really reflect how she came to
2 that diagnosis.

3 Q. Okay. Turn in your book to Plaintiff's Exhibit No. 60,
4 please.

5 THE COURT: Plaintiff's 60?

6 MS. CORREIA: Yes.

7 THE WITNESS: Okay. Thank you. Got it.

8 BY MS. CORREIA:

9 Q. Do you have page 12 -- 1512 at the bottom?

10 A. Yes.

11 Q. Do you see where it says at the top, "Impact of Symptoms
12 on Daily Living and Family"?

13 A. Yes.

14 Q. "(E.g. housing, housekeeping, job, medical, hygiene,
15 eating, sleep, money management, caring for children, etc.)"?

16 Still on the same page.

17 A. No, no, I understand. I'm looking for the date of the
18 document.

19 Okay. Yes, I do.

20 Q. Those were the bases for Ms. Harlow's observations on the
21 impact of symptoms on daily living and family, right?

22 A. Those are not Ms. Harlow's observations. Those are
23 Ms. Doe's self-report and Ms. Harlow's documentation of
24 Ms. Doe's self-report.

25 Q. Right. And you've said in your testimony that the -- that

1 self-reporting in the therapeutic setting is normal. That's
2 how --

3 A. Yes.

4 Q. -- therapists do their job, right?

5 A. Yes.

6 Q. Okay. And when you interviewed Jane Doe in March of 2019,
7 you used your own checklist to ask her about symptoms she had
8 experienced in the six months before your interview, right?

9 A. Among other things, but yes.

10 Q. Okay. And on that checklist, you asked her about things
11 like whether she had experienced depression, right?

12 A. Depressed mood, yes.

13 Q. And she reported that she had, right?

14 A. Yes.

15 Q. And she also reported that something small would get her
16 really upset. And that was unusual, right?

17 A. I'd have to look at the document to see what I wrote down.

18 Q. Sorry, I don't have a clean copy at the moment.

19 A. Okay.

20 Q. Do you have the page from your report that is the
21 checklist?

22 A. Yes.

23 Q. Okay. And does that help refresh your recollection that
24 she reported that something small would get her really upset?

25 A. Yes.

1 Q. You didn't explore that further with her, did you?

2 A. I don't recall.

3 Q. And she was experiencing increased tearfulness two or
4 three times a week?

5 A. That's what she reported.

6 Q. And she never used to?

7 A. That's what she reported.

8 Q. And she also reported that she was sometimes having
9 feelings of guilt, right?

10 A. Yes.

11 Q. And isn't that a common emotion that's experienced by
12 people who have experienced sexual trauma?

13 A. It's a common emotion among people generally.

14 Q. Isn't it a common emotion experienced by people who have
15 experienced sexual trauma?

16 A. I don't really characterize it, the emotion people
17 experience as sexual trauma. They wonder if they've somehow
18 done something that caused it or somehow are responsible for
19 it, which I differentiate from guilt regarding I did this and I
20 feel guilty about it.

21 Q. Self-blame, is that better?

22 A. That's a better word, thank you.

23 Q. And she also reported having poor concentration?

24 A. She did. And I asked her why, and she said: Because of
25 this. Meaning having to come in for the psychiatric

1 evaluation. So --

2 Q. She was having poor concentration because she had to come
3 in for a psychiatric evaluation?

4 A. Well, because of the psychiatric evaluation and the
5 ongoing litigation.

6 Q. No, she didn't talk about litigation, did she?

7 A. She -- I don't remember her using the word "litigation,"
8 but it was clear that the lawsuit was a stressor for her.

9 Q. You didn't find that -- you didn't recall the word
10 "litigation" because she didn't say that to you. It's not in
11 that report, is it?

12 A. No, most people don't use the word "litigation." They
13 talk about their lawsuits.

14 Q. She didn't tell you in that report, and it's not in any of
15 your handwritten notes there, that she said anything about
16 litigation, did she?

17 A. The word "litigation" was not used.

18 Q. One last thing. You mentioned something about whether or
19 not Jane Doe had any changes in her functioning in her
20 extracurriculars, right?

21 A. Well, in any kind of functioning, but extracurricular
22 functioning is one kind, yes.

23 Q. Right. And you wanted to be very careful about how you
24 viewed the facts that were in front of you in this case, right?

25 A. I tried to be.

1 Q. You wanted to be accurate?

2 A. I tried to be.

3 Q. And you know band wasn't an extracurricular activity for
4 Jane Doe, was it?

5 A. Well, if I'm mischaracterizing it, you can, you can tell
6 me. I mean, it's not English. Not every kid has to do band,
7 but every kid has to do English. So I don't know how you want
8 to characterize that.

9 Q. She got a grade on her report card for band, right?

10 A. I don't specifically recall.

11 Q. You didn't see that record?

12 A. I might have seen it. I don't specifically recall.

13 MS. CORREIA: I have nothing further.

14 THE COURT: All right. Redirect?

15 MS. CALEM: Just briefly, Your Honor.

16 REDIRECT EXAMINATION

17 BY MS. CALEM:

18 Q. Just a couple of questions, Dr. Gold. First, with respect
19 to your forensic work, have you worked for both plaintiffs and
20 defendants?

21 A. Yes.

22 Q. And if --

23 A. In about -- in about equal percentages.

24 Q. Thank you.

25 With regard to the, the materials that you reviewed

1 in this case, did you ask for certain materials --

2 A. Yes.

3 Q. -- to be sent to you?

4 A. Yes.

5 Q. Was there anything that you asked for that was not sent to
6 you?

7 A. No. And, in fact, before designating which specific
8 things I want sent to me, as a general rule, I always say, when
9 they say what do you want to see, I want to see everything.

10 So I can't know a priori what the universe of
11 everything is, but I ask for everything, and then I list things
12 that I'm pretty sure either exist or might exist.

13 Q. And with respect to Ms. Correia's last question about the
14 discussion of litigation, can I ask you please to just look at
15 your deposition transcription for a moment?

16 A. Yes.

17 Q. And it's a condensed transcript, with four pages per one
18 page, but if you would look at page No. 124 of the condensed
19 pages?

20 A. Oh, sorry.

21 Yes.

22 Q. And if you start at line 13, could you read from lines 13
23 to 18? And let me know when you're done.

24 A. Okay.

25 MS. CORREIA: Objection, Your Honor.

1 THE COURT: To refreshing her recollection?

2 MS. CORREIA: Yes.

3 THE COURT: Overruled.

4 BY MS. CALEM:

5 Q. Does this refresh your recollection as to whether or not
6 you had a discussion during your deposition as to whether -- as
7 to what Ms. Doe meant when she said "this"?

8 MS. CORREIA: Objection. The question is refreshing
9 a recollection about what was discussed in the deposition.

10 MS. CALEM: Let me -- I can rephrase that.

11 THE COURT: Let me -- yeah, rephrase it.

12 BY MS. CALEM:

13 Q. Does this refresh your recollection as to whether you had
14 any conversation with Ms. Doe that pertained in some way to the
15 lawsuit?

16 A. Yes. Without, without the actual use of the
17 word "litigation."

18 Q. And the conversation with respect to the lawsuit that's
19 reflected here in this deposition that you just read, how did
20 that come up?

21 A. When I asked why she thought she was having -- when
22 someone gives me a positive response to a symptom, I ask them
23 if they know why. Sometimes people can't concentrate because
24 they didn't sleep well the night before. So I ask, "Why do you
25 think you're having trouble concentrating?"

1 And the answer to the question was, "This," which I
2 understood to mean having to come in and see me as part of the
3 litigation, which she clearly didn't want to do, and which most
4 people find extremely stressful.

5 Q. And is that what you testified to in your deposition?

6 A. I believe so, yes.

7 MS. CALEM: Nothing further.

8 THE COURT: Okay. May Dr. Gold be excused?

9 MS. CALEM: Yes, Your Honor.

10 THE COURT: All right. Thank you, Dr. Gold. You're
11 excused.

12 THE WITNESS: Thank you, Judge. Thank you.

13 THE COURT: Please don't discuss the testimony you've
14 given until our trial is over, all right?

15 THE WITNESS: Thank you.

16 THE COURT: Have you got what you came in with, do
17 you think?

18 THE WITNESS: That's always a good question.

19 THE COURT: All right. Have a good afternoon.

20 THE WITNESS: Thank you. Good to see you again,
21 Judge. Wrong way.

22 (Witness excused.)

23 THE COURT: Ms. Rewari, where are we?

24 MS. REWARI: Your Honor, we don't have any further
25 witnesses. We do have a portion of the plaintiff's deposition

1 in light of the Court's ruling after the lunch break that we
2 would like to read in, but I haven't shared it with them yet,
3 so --

4 THE COURT: Plaintiff's deposition?

5 MS. REWARI: Yes.

6 THE COURT: Why don't we take a short recess, okay?
7 And the -- Ms. Rewari has just indicated that they may have
8 some additional information which they want to present, and
9 then we may have a couple of rebuttal witnesses.

10 So let us talk about that and get set up, and we'll
11 get you back here as soon as we're able. Thank you. You're
12 excused.

13 NOTE: At this point, the jury leaves the courtroom;
14 whereupon, the case continues as follows:

15 JURY OUT

16 THE COURT: Okay. I don't think I understand. You
17 want to put in some deposition testimony of Jane Doe?

18 MS. REWARI: Yes, to address the point about what the
19 prior conversation with Karoline on the bus was in light of the
20 Court's ruling.

21 THE COURT: That was all testified to and you had the
22 opportunity to, to impeach her during the trial, right?

23 MS. REWARI: But she's also on our witness list, and
24 she's a prior -- I mean, she's -- it's an admission by --

25 THE COURT: All right.

1 MS. REWARI: Thank you. And the plaintiff's
2 deposition can be used for any purpose in our case, and it is
3 one page of her deposition that -- where she has a recollection
4 of the conversation with Karoline.

5 THE COURT: Okay. All right. Any objection to the
6 use of the deposition?

7 MR. ATES: We don't -- we haven't seen it. We don't
8 know -- we haven't been able to look at it for completeness.
9 We, we know nothing of what they're trying to introduce.

10 THE COURT: Well, I mean, deposition testimony is
11 admissible, and -- of the plaintiff is admissible, I think, and
12 I haven't seen it either.

13 MR. ATES: Right.

14 THE COURT: But it's not, it's not inadmissible as a,
15 as a rule of law. So you just need the opportunity to see it,
16 and I'll give you that opportunity right now.

17 And that will close the defendant's case; is that
18 correct?

19 MS. REWARI: Yes.

20 THE COURT: And do you want to renew your motion? Do
21 you need to -- I think you need to review -- renew your motion
22 for the record just to preserve it.

23 MR. RAPHAEL: Yes, Your Honor.

24 MS. REWARI: Yes.

25 MR. ATES: We would have a Rule 50 on -- they have a

1 mitigation defense, Your Honor, and we would want to move on
2 Rule 50 on mitigation.

3 THE COURT: And I'll -- we'll put a hold marker on
4 both of those until we finish the testimony.

5 MR. ATES: I understand that you want to get the jury
6 out of here, Your Honor.

7 THE COURT: Correct. I'd like to go home sometime,
8 and I'm sure you-all would like to go home sometime also.

9 MR. ATES: That would be nice, Your Honor.

10 THE COURT: But that will happen later.

11 Okay. Then are you ready to go into your rebuttal
12 case when Fairfax County is done with this last testimony?

13 MR. ATES: I believe the treating counselor is
14 outside, Your Honor --

15 THE COURT: Okay.

16 MR. ATES: -- but I need to confirm that, but my
17 understanding is she is.

18 THE COURT: Yeah, let's take a five-minute recess or
19 ten minutes, whatever you need to get a chance to review the
20 deposition testimony, and then -- and get your witness ready.

21 MR. ATES: Thank you, Your Honor.

22 THE COURT: Okay. All right. We're in recess.

23 NOTE: At this point, a recess is taken; at the
24 conclusion of which the case continues in the absence of the
25 jury as follows:

1 JURY OUT

2 THE COURT: Yes, sir.

3 MR. ATES: I just want to note an objection, Your
4 Honor, that we're -- they had the opportunity to cross my
5 client, and as I understood this Court's practice, if they do
6 do that, then that's their opportunity to examine the witness.
7 I've had to put on a witness adversely, Your Honor, where I put
8 my paralegal in the box and we go through it that way, but they
9 chose to do the cross-examination of Doe, and therefore, we
10 would ask that, you know, this not be allowed at this time.

11 THE COURT: Okay. Well, they did -- she's on their
12 witness list, so they could call her live, I think. I'm not
13 sure there was an agreement on -- that she would just be called
14 once. I don't recall that, but that may have been between the
15 two of you, but I think it's a part of their defendant's case,
16 and I think they're permitted to put it in.

17 MR. ATES: I just want to note the objection, Your
18 Honor.

19 THE COURT: Your exception is noted.

20 MR. ATES: Thank you.

21 THE COURT: All right. So are you ready then to go
22 into your rebuttal case?

23 MR. ATES: I believe what's about to happen is they
24 will put a paralegal in the stand, Ms. Rewari will question,
25 the paralegal will answer as if she were Ms. Doe. If -- that's

1 going to be three minutes probably.

2 And then we will be prepared to either play the
3 video, Your Honor, or call the treating person in.

4 THE COURT: Okay.

5 MR. ATES: Thank you, Your Honor.

6 THE COURT: All right. Joe, let's get our jury in,
7 please.

8 MR. ATES: Oh, one -- I'm sorry, Your Honor.

9 THE COURT: Yes, sir.

10 MR. ATES: One quick thing. My understanding under
11 the Virginia treatment rule, ethics rules, is Jane Doe is under
12 treatment with the counselor or the person we're going to call,
13 and the counselor has asked that Jane Doe not be present during
14 that, and we just would like some note or explanation to the
15 jury that, that Ms. Doe is not present because there is a
16 current treatment relationship.

17 THE COURT: Okay.

18 MR. ATES: Is that fair enough, Your Honor?

19 THE COURT: Yeah.

20 Any objection to that?

21 MS. REWARI: No, Your Honor.

22 THE COURT: Okay. Fine.

23 MR. ATES: Thank you, Your Honor.

24 THE COURT: Yes, sir.

25 Okay, Joe. Please.

1 NOTE: At this point, the jury returns to the
2 courtroom; whereupon, the case continues as follows:

3 JURY IN

4 THE COURT: All right. Please have a seat.

5 All right. Ms. Rewari, you want to, you want to read
6 part of the deposition of Jane Doe, and you're going to use
7 your paralegal to act as Jane Doe and take the witness stand;
8 is that correct?

9 MS. REWARI: Yes. Just to read the answers.

10 THE COURT: Sure. So you could do a Q&A.

11 MS. REWARI: Ms. Smoot will do that.

12 THE COURT: Please, come forward and take the witness
13 stand.

14 MS. REWARI: And, Your Honor, I'm reading from the
15 deposition taken on March 6, 2019, page 272, line -- starting
16 at page 272, line 12.

17 THE COURT: All right. Thank you.

18 JANE DOE - Deposition Excerpt -

19 BY MS. REWARI: (Reading)

20 Q. At some point that weekend, you learned that Jack Smith
21 had a girlfriend, right?

22 A. Yes.

23 Q. When did you learn that?

24 A. Thursday.

25 Q. Thursday?

1 A. Yes.

2 Q. Okay. Tell me about that.

3 A. When I was having my conversation with Karoline about what
4 happened, she seemed even more surprised because she knew that
5 he had a girlfriend.

6 Q. What did you say?

7 A. I just thought it was kind of screwed up that he would do
8 something like that.

9 Q. How was the girlfriend -- the fact of the girlfriend
10 relevant to what you were discussing?

11 A. Well, because he had cheated on her basically.

12 Q. With you?

13 A. Yes.

14 Q. Who was his girlfriend?

15 A. I don't remember her name. I just know she went to
16 Langley and she was on the trip.

17 Q. The Langley band was on the trip?

18 A. Yes.

19 Q. Were they in the same hotel?

20 A. Yes. Actually, I don't remember.

21 Q. And is there anything else about his girlfriend that you
22 and Karoline discussed in that first conversation?

23 A. Not that I remember.

24 (End of deposition excerpt.)

25 MS. REWARI: Thank you.

1 THE COURT: All right. Thank you.

2 Does that conclude the county's defense case?

3 MS. REWARI: Yes. The School Board rests, Your
4 Honor.

5 THE COURT: All right. Thank you.

6 Then we'll hear rebuttal testimony. Mr. Ates?

7 MR. ATES: Yes, Your Honor. Pursuant to what we
8 discussed outside of the presence of the jury, we'll go ahead
9 and put on the next witness.

10 THE COURT: All right. Go ahead.

11 MS. KHOURI: Plaintiff calls Meredith Kerley, Your
12 Honor.

13 THE COURT: All right. She's on her way in.
14 Jane Doe is excused for this testimony because of Virginia laws
15 regarding ongoing treatment by a counselor. This testimony
16 should not be conducted while Jane Doe is present in the room.
17 She's excused herself so that she's not listening to what the
18 counselor is saying at this time because of the ongoing nature
19 of their relationship. Okay?

20 MEREDITH KERLEY, PLAINTIFF'S WITNESS, SWORN

21 THE COURT: All right. Good afternoon.

22 THE WITNESS: Good afternoon.

23 THE COURT: I can already tell that you have a soft
24 voice. I'm going to need you to get a little closer to that
25 microphone --

1 THE WITNESS: Okay.

2 THE COURT: -- to make sure we all can hear you.

3 THE WITNESS: Okay.

4 THE COURT: Thank you.

5 Go ahead.

6 MS. KHOURI: Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY MS. KHOURI:

9 Q. Good afternoon. Can you please state your name.

10 A. I'm Meredith Kerley.

11 Q. Okay. Ms. Kerley, what is your profession?

12 A. I'm a licensed clinical social worker and therapist.

13 Q. And where do you currently work?

14 A. At the Growth & Recovery Center.

15 Q. What does the Growth & Recovery Center do?

16 A. We are a group of therapists who provide psychotherapy,
17 individual, group, family, all individual practitioners.

18 Q. Okay. How long have you worked in your current role?

19 A. I believe I started there in 2012, so --

20 Q. What type of services do you specifically provide?

21 A. I do individual counseling, individual therapy, as well as
22 group therapy.

23 Q. Do you specialize in any certain type of therapy?

24 A. I work with adolescents, and I do a particular type of
25 therapy that's called dialectical behavioral therapy and I do

1 cognitive behavioral therapy. I also work with adolescents and
2 adults who have experienced trauma, domestic violence, sexual
3 violence; and I specialize in eating disorders and sort of a
4 general practice.

5 Q. How do you know the plaintiff, Jane Doe?

6 A. Jane Doe is a current client of mine.

7 Q. Okay. And so you know who I'm referring to when I say
8 "Jane Doe"?

9 A. I do.

10 Q. Okay. How did Jane Doe come to find you?

11 A. Jane Doe was referred to me by her previous therapist,
12 Kathryn Harlow.

13 Q. When did you first start seeing Jane Doe?

14 A. I started seeing her in the -- I believe it was March of
15 2018.

16 Q. Okay. As someone who's worked with Doe now for a little
17 over a year, can you tell us about her?

18 A. Sure. She and I have a very good therapeutic
19 relationship. We have from the beginning. You know, if I
20 think of words to describe her, you know, the majority of them
21 are very positive. She's very kind, very generous, very
22 compassionate, very driven, you know, really stands up for what
23 she believes in and really works hard in therapy. I think she
24 really wants to heal and grow and, you know, has just been a
25 pleasure to work with.

1 Q. How does Jane Doe express her emotions?

2 A. She, she doesn't always connect with her emotions.

3 She's -- she does what I describe as sort of intellectualizing
4 a lot. We've worked a lot on her being able to identify and
5 express emotions, be able to name them.

6 A common defense mechanism for people when they don't
7 want to feel emotions is to kind of be in their head and
8 intellectualize, and so part of our work has been helping her
9 to identify her emotions and name them.

10 Q. Okay. When you first started seeing Jane Doe, did she
11 tell you about a sexual assault?

12 A. She did, yes.

13 Q. Okay. Did she also tell you about concerns regarding the
14 school's actions in response to a sexual assault?

15 A. She did, yes.

16 Q. Okay. At the point in time when she first came to see
17 you, that was March of 2018, right?

18 A. Correct.

19 Q. Okay. Did you understand that the -- that she claimed the
20 assault had happened a year before?

21 A. Yes. That was my understanding.

22 Q. Okay. How did you at the time where -- when Jane Doe was
23 first walking into your offices observe the effects of the
24 sexual assault and the school's response?

25 A. You know, I observed it in a number of different ways.

1 When she first came to me, you know, it was a year after the
2 assault, and I believe that her symptoms were manifesting a bit
3 differently than maybe they had previously. She was
4 experiencing a number of eating and food-related symptoms in
5 addition to some, some general anxiety and changes in mood and,
6 you know, difficulty -- she reported difficulty concentrating
7 in school and on work, which I know that some of those had been
8 going on previously, but in particular when I first started
9 seeing her, she was having a lot of trouble with food and
10 eating and sort of different manifestations of that.

11 Q. How do trauma symptoms manifest in food and eating?

12 A. With Jane Doe in particular, it was through sort of
13 unconscious restriction of her intake, and -- well, and a lot
14 of times that happens because it numbs people out. If they're
15 not properly nourished, it kind of numbs them out.

16 And she also reported feeling sick, feeling like she
17 was going to throw up, throwing up quite frequently, just
18 completely losing her appetite. She had lost a significant
19 amount of weight, and was really kind of going downhill in that
20 regard. So --

21 Q. Was there other stressors going on in Jane Doe's life at
22 the time when she first came to see you?

23 A. So the stressors that I would say that were present -- so
24 she was still in her senior year at her high school, which, of
25 course, was a stressor in itself given the interactions that

1 she had with the school, and she also had a boyfriend, and he
2 wasn't necessarily the problem. It was -- you know, there was
3 nothing that he was doing. It was sort of her reaction to him
4 based on the trauma that she had experienced. So that was a
5 stressor.

6 Q. What was her reaction to him?

7 A. She sort of unconsciously, I think -- well, what she
8 described to me is that she would feel sick whenever she was
9 with him. She would feel like she was going to throw up when
10 she was with him, and she would then not eat either before or
11 after to avoid getting sick when she was with him, but I think
12 what was really going on is that, you know, she was sort of
13 unconsciously -- sort of that fear of intimacy, you know, fear
14 of future trauma, you know, experiences of betrayal, of hurt,
15 you know, getting close to somebody, I think those were coming
16 up for her, although she didn't quite make that connection in
17 the beginning.

18 Q. How did you make that connection?

19 A. We did -- I, with her, did a lot of psychoeducation on why
20 especially disordered eating symptoms manifest in the way that
21 they do. Frequently, it's not about the food or the eating;
22 it's about the underlying emotions; and her emotions were
23 related to the trauma itself as well as, you know, the response
24 that she received from the school; and so the way that I
25 describe it is it's sort of like the body's way of

1 communicating something, that something isn't right.

2 And so behaviorally, her symptoms manifested
3 behaviorally, but they were really rooted in emotion. So we
4 did a lot of -- I did a lot of psychoeducation around that and
5 helped her to make different connections.

6 Q. Did you -- have you taken notes of your sessions with
7 Jane Doe?

8 A. I write notes after our sessions.

9 Q. All right. Can you describe to me your note-taking
10 process?

11 A. Yeah. I follow sort of what's set forth by the social
12 work guidelines, and so I, you know, state the name of the
13 client, the date, how long the session was, any observations
14 that I made, what the diagnosis was, you know, a very brief
15 description of what we talked about. If there's any change in
16 medications, I do a risk assessment, and if there's any plan
17 for the next session.

18 Q. All right. Can you turn in your book, which you might
19 have in front of you, to Plaintiff's Exhibit 61, please?

20 Can you tell me what Plaintiff's Exhibit 61 is?

21 A. This is an intake assessment that I did following the
22 intake session that I did with Jane Doe.

23 Q. Okay. Can you flip through it and tell me if there's more
24 in there than just the intake assessment?

25 A. There's also the treatment plan that I did after I first

1 met with her -- or the first, I think, couple of sessions, and
2 my clinical notes starting back in March of 2018 and through
3 our most recent session, which was, I think, the end of July.

4 MS. KHOURI: Okay. Your Honor, I'll move the
5 admittance of Plaintiff's Exhibit 61, but first -- I won't
6 publish to the jury right now given the conversation we've had
7 about other records and --

8 THE COURT: Yeah, okay. You may reference it in
9 your, in your questions and answers. We'll reserve on the
10 exhibit itself.

11 MS. CALEM: We have the same objection we did before
12 with respect to the other one.

13 THE COURT: Understood. Thank you.

14 MS. KHOURI: Thank you.

15 BY MS. KHOURI:

16 Q. If you could turn to page that's marked at the bottom
17 1397? I just want to talk about your psychotherapy treatment
18 plan with Jane Doe.

19 A. Okay.

20 Q. Okay. So it says here that you've reached a diagnosis of
21 adjustment disorder with anxiety; is that right?

22 A. That is correct.

23 Q. How did you come to that diagnosis?

24 A. I came to that diagnosis based on -- so an adjustment
25 disorder is the development of some behavioral and emotional

1 symptoms, and they're in response to certain -- a certain
2 stressor or stressors, and they, they manifest in ways that are
3 clinically significant and impact somebody socially,
4 occupationally, interpersonally, in various aspects of their
5 lives, and so Jane Doe was exhibiting, you know, many symptoms
6 and was impacted in different areas of her life related to the
7 stressors that were going on.

8 Q. How did you define what the stressor was that, that caused
9 this adjustment disorder?

10 A. Well, I mean, the initial stressor, of course, was the
11 assault and the response that she received from the school, and
12 then at the time that I saw her, there's a -- if you read
13 further into the diagnostic criteria, it talks about how if a,
14 if a stressor or stressors persist over time, then the
15 adjustment disorder can also persist, as opposed to having a
16 defined time limit, and so I think she was also -- the
17 stressors that was going on was she was also in her senior year
18 at the same high school that she had been at, and she was also
19 in this relationship with the boyfriend, who again was not --
20 it was not about him. It was about her reaction to the trauma
21 that she had experienced that was manifesting through her
22 relationship with him.

23 Q. Okay. How do you think the school's response affected
24 Jane Doe?

25 MS. CALEM: Objection, Your Honor. This is outside

1 the scope of the rebuttal --

2 THE COURT: Overruled.

3 MS. CALEM: -- as identified.

4 THE COURT: Go ahead. You may answer.

5 THE WITNESS: I'm sorry, can you repeat the question?

6 BY MS. KHOURI:

7 Q. Yeah. How do you -- through your treatment with Jane Doe,
8 how do you think the school's response affected Jane Doe's
9 emotional well-being?

10 A. I mean, I think it's greatly impacted her. You know, we
11 talk about how -- you know, I think just --

12 MS. CALEM: Your Honor, may we approach?

13 THE COURT: Yes.

14 NOTE: A sidebar discussion is had between the Court
15 and counsel out of the hearing of the jury as follows:

16 AT SIDEBAR

17 THE COURT: Hello again.

18 MR. ATES: Hello.

19 MS. CALEM: Your Honor --

20 THE COURT: Go ahead. I thought I understood the
21 objection, but I may not have. Go ahead.

22 MS. CALEM: This is case-in-chief testimony. This
23 witness was designated as a rebuttal expert with respect to the
24 issue of the boyfriend only.

25 MS. KHOURI: That's not -- I mean, we could look at

1 our 26(a) disclosure and our rebuttal disclosure. It was a
2 whole paragraph of things that she would talk about, which
3 included Jane Doe's treatment. The boyfriend -- I'm not even
4 actually sure if the boyfriend was listed in our disclosure,
5 but it was about her treatment of Jane Doe, because Dr. Liza
6 Gold specifically referenced Meredith Kerley's treatment plans
7 and her notes.

8 MS. CALEM: It was rebuttal of Dr. Gold's report
9 specific to the extent Dr. Gold commented on her treatment, on
10 Ms. Kerley's treatment, including the most recent, especially
11 with her most recent production, the issue of the boyfriend.
12 This is sounding much more like case-in-chief testimony about
13 her problems generally.

14 MS. KHOURI: Our rebuttal disclosure wasn't specific
15 to the boyfriend. It specifically said her treatment of Jane
16 Doe because Dr. Gold has six pages referring to the treatment
17 records of Meredith Kerley.

18 MS. CALEM: But she needs to rebut Dr. Gold's
19 testimony. This is going beyond what Dr. Gold testified about.
20 She did not talk about the investigation.

21 THE COURT: Dr. Gold quantified what she thought to
22 be the emotional harm that Jane Doe suffered, putting No. 1,
23 the girlfriend; putting No. 2, the fact that she thought she
24 was going to get in trouble; putting maybe No. 3, the treatment
25 that she received; or 4, that -- what the school did.

1 But she certainly -- her testimony included the
2 emotional, whether or not she had been -- suffered emotional
3 trauma from the way the school treated her. That was her --
4 that was, I think, one of the initial questions of what were
5 you asked to do, right?

6 MS. CALEM: She was asked to opine about the extent
7 of emotional distress. She identified two periods of acute
8 emotional distress and then talked about functioning
9 afterwards.

10 THE COURT: Okay. That doesn't mean that plaintiffs
11 have to follow your road map in their response. So your
12 exception is noted. I'm going to allow the testimony.

13 MR. ATES: Thank you, Your Honor.

14 NOTE: The sidebar discussion is concluded;
15 whereupon, the case continues before the jury as follows:
16 BEFORE THE JURY

17 THE COURT: Please go ahead.

18 MS. KHOURI: Thank you.

19 BY MS. KHOURI:

20 Q. Ms. Kerley, how did you observe the school's response
21 affect Jane Doe?

22 A. The way that she would describe it to me is that, you
23 know, prior to the school's response, she didn't have much
24 reason to be distrustful of people in her experiences.
25 However, because of the response that she got from the school,

1 she -- you know, people that she felt were supposed to protect
2 her and sort of take care of her let her down, hurt her.

3 And she now kind of approaches relationships, you
4 know, both friendship-wise and otherwise, through this lens of
5 having experienced this trauma from the school, and so she is a
6 lot more distrusting of people. She fears, you know, future
7 trauma, or sort of being betrayed or let down as a result of
8 what she experienced.

9 Q. Is that something that you've seen continue to manifest
10 throughout your treatment with Jane Doe?

11 A. I have, yes.

12 Q. Even in the last month or so?

13 A. I, I think mostly we talked about it through the last
14 semester of her -- the last semester of college. We have
15 talked about it a little bit since she's been home from school,
16 but a lot of -- a lot of what we talked about was in relation
17 to the relationships that she had at school and with friends at
18 home too, who she's just not seeing as frequently.

19 Q. So you continue to see Jane Doe even while she's at
20 college?

21 A. Excuse me. I did -- so we had our last session before
22 college in August of 2018. I saw her again, I don't have it in
23 front of me, but I believe it was before she went back to
24 school for winter break -- or after winter break, and then we
25 would have phone sessions or virtual sessions while she was

1 away at school, and then once she came home from school, we
2 resumed our mostly weekly sessions.

3 Q. In your -- if I can point you back to your treatment plan,
4 you have underneath Treatment Goals: Decrease post-trauma
5 symptoms, including anxiety, flashbacks of disturbing images
6 and memories, changes in mood, fear, and difficulty
7 concentrating.

8 Do you see that?

9 A. I do.

10 Q. Can you describe to me how you observed Jane Doe's
11 anxiety?

12 A. Actually physically observed it?

13 Q. Yes.

14 A. You know, I don't, I don't know that I physically observed
15 it necessarily. She, you know, I think, would -- she would
16 come and describe it to me as opposed to me observing it.

17 Q. What has Jane Doe described?

18 A. You know, she describes experiencing intrusive thoughts,
19 intrusive memories. She -- well, and I'm -- when I did this
20 treatment plan, it was when we first started meeting, and so
21 she would experience the intrusive thoughts. She had some fear
22 of future trauma that she would describe to me.

23 A lot of these post-trauma symptoms, like I said,
24 were manifesting through this relationship with her boyfriend
25 at the time and really impacting that. But, you know, she

1 reported that in school she wasn't as focused or -- although
2 still did very well but had a little bit more difficulty
3 focusing.

4 Q. Can I ask, what does the fact that Jane Doe still
5 continues to get out of bed every morning and go to school, how
6 does that factor into, you know, your assessment of her
7 emotional well-being?

8 A. I think she's an incredibly resilient person. I think
9 she's so driven that that's just what she does. She -- you
10 know, I ask her sometimes, you know, how, how she's coping, how
11 she does it, and she just says: Well, I just do.

12 And I think that's just part of her nature, is to --
13 you know, like I said, she's really resilient and really driven
14 and just does.

15 Q. Does that mean that she's healed of all of her problems?

16 A. No, absolutely not.

17 Q. Why not?

18 A. I, I think, like I said, it's part of Jane Doe's sort of
19 way of being too just continue forward, but I think when she is
20 in situations that trigger some of these emotions, she really
21 feels them, and a lot of those are through relationships with
22 other people, and she really, you know, she really experiences
23 them then.

24 Q. How do you continue to see the signs of Jane Doe's anxiety
25 in your treatment in -- like, let's focus on 2019.

1 A. Um-hum. Do you want me to start with most recent?

2 Q. Sure.

3 A. Okay. So in, in May of this year, she started -- or she
4 reported having panic attacks that I believe, if I recall
5 correctly, had started sometime during the spring semester of
6 college. And, you know, through assessment, I diagnosed her
7 with panic disorder. She was having panic attacks pretty
8 regularly, usually at home.

9 Q. And what relationship, from your perspective, does
10 these -- your treatment in 2019 or these panic attacks have to
11 do with the -- her anxiety from before, when she was at -- in
12 high school?

13 A. You know, I think it's a different manifestation of
14 anxiety. It -- you know, it's something that we only recently
15 started working on, so I can't say I can make a direct, you
16 know, connection to, or not, to anything really, but I think,
17 you know, over time, we've seen her anxiety manifest in
18 different ways from when the -- you know, when the assault and
19 the response from the school first happened and then, you know,
20 through this relationship with her boyfriend, it manifested
21 differently.

22 And now, for whatever reason that I haven't
23 necessarily gotten to what's at the root of it, it's
24 manifesting differently again. And so that's what we're --
25 we're working on managing it behaviorally, and then we get to

1 what's underneath of it.

2 Q. How do you weigh Jane Doe's response to, say, what the
3 school did versus age appropriate teenage issues? How do you
4 weigh what is affecting her?

5 A. Yeah. I -- you know, I think it's really important to
6 factor in that, you know, Jane Doe can have age appropriate --
7 what did you call it? Age appropriate --

8 Q. Stressors.

9 A. Stressors.

10 Q. I might have said "things," but stressors is a better
11 word.

12 A. Yeah, age appropriate stressors because of her age and
13 stage in life, and she can have them because of the trauma that
14 she experienced. You know, they can be separate, or they can
15 be intertwined, and so we really just have to tease it apart.

16 Q. Do you believe that she is still affected by what happened
17 in March of 2017?

18 A. I do.

19 MS. KHOURI: Nothing further. Thank you, Your Honor.

20 THE COURT: All right. Thank you.

21 Cross-examination?

22 CROSS-EXAMINATION

23 BY MS. CALEM:

24 Q. Good afternoon, Ms. Kerley.

25 A. Good afternoon.

1 Q. You've been a licensed therapist since 2008?

2 A. I graduated in 2008 from my MSW program, and I got my
3 license, it was either 2011 or two thousand and -- I think it
4 was 2011. It may have been 2012.

5 Q. All right. And you've had your own private practice since
6 about 2012?

7 A. Correct.

8 Q. And you have a patient load of about 19 to 25 patients at
9 a time?

10 A. Correct.

11 Q. And the therapeutic technique that you used called
12 dialectical behavioral therapy, which is a big mouthful so I'm
13 just going to say DBT, this technique isn't only used to treat
14 people who have experienced sexual assault, correct?

15 A. That's correct.

16 Q. It can be used to treat anxiety stemming from any source,
17 correct?

18 A. Correct.

19 Q. Eating disorders, depression, etc.?

20 A. Yes.

21 Q. When you first met Ms. Doe, were you -- had she commenced
22 litigation in this case?

23 A. I don't remember. I don't recall.

24 Q. During the course of your treatment of her, you became
25 aware of this litigation, did you not?

1 A. I did, yes.

2 Q. And your information about Ms. Doe comes from her
3 self-reporting; is that correct?

4 A. That's correct.

5 Q. So you accept what she tells you as true because that's
6 your job as her therapist, correct?

7 A. Correct.

8 Q. You don't go to any external sources to corroborate the
9 accuracy of what she's told you, correct?

10 A. Correct.

11 Q. Has Ms. Doe shared with you any of the text messages she
12 has exchanged with her friends regarding her anxiety or her
13 boyfriend?

14 A. No, she has not.

15 Q. Did you review Ms. Harlow's medical records?

16 A. I did not.

17 Q. And did you speak to Ms. Harlow?

18 A. She and I, unfortunately, never connected. We played a
19 bunch of phone tag and then never connected.

20 Q. And you were not present, of course, when Ms. Harlow
21 interviewed Ms. Doe and treated her, correct?

22 A. Correct.

23 Q. Do you have any information as to what Ms. Harlow's final
24 conclusions were at the time of discharge?

25 A. I can't speak to that. I don't know.

1 Q. Now, Ms. Doe reported to you that she lost a lot of weight
2 in a significant period of time, correct?

3 A. Correct.

4 Q. And she reported throwing up a lot when she was around her
5 boyfriend, correct?

6 A. Correct.

7 Q. Did you independently verify when Ms. Doe started to lose
8 weight?

9 A. She reported to me that it was, I believe if I'm recalling
10 correctly, about three or four months prior.

11 Q. Did you examine any medical records which tracked her
12 weight?

13 A. I did not.

14 Q. Did you yourself weigh her at each of your sessions?

15 A. I do not do that, no.

16 Q. So her, her weight is based on her self-report as well?

17 A. That's correct.

18 Q. Are you aware of whether she had started to lose weight
19 before she began to date this high school boyfriend?

20 A. I actually -- she had been with the boyfriend for about
21 four months was my understanding, and she reported to me that
22 the weight loss had started about three or four months prior.
23 So I think they, from my understanding and recollection, line
24 up.

25 Q. Do you know whether -- are you aware of whether Ms. Doe

1 had any stomach issues or GI issues prior to dating this
2 boyfriend, such as acid reflux?

3 A. I don't know that information.

4 Q. Acid reflux can cause vomiting, can it not?

5 A. I mean, I'm not an expert, so I don't know.

6 Q. Okay. And you're not aware of whether or not she had any
7 eating problems at the time she was consulting with Ms. Harlow,
8 correct?

9 A. None that she told me about.

10 Q. Is it accurate that Ms. Doe herself attributed her weight
11 loss at least in part to general anxiety?

12 A. I'm sorry, can you repeat that? I didn't hear part of it.

13 Q. Is it accurate that Ms. Doe herself attributed her weight
14 loss at least in part to generalized anxiety?

15 A. Whether or not she stated that, I don't know. That's my
16 opinion, that there's -- that it was connected some to just
17 general anxiety, as well, I think, she -- you know, I think
18 there was a loss of appetite, just kind of general disinterest
19 in eating based on anxiety.

20 Q. All right. If Ms. Doe had told Dr. Gold, who is our
21 forensic expert, that she was involved in a romantic
22 relationship with this boyfriend in her senior year of high
23 school, and that her ability to be in this relationship was
24 unaffected by the alleged sexual assault, this would be
25 inconsistent with her report to you, correct?

1 MS. KHOURI: Objection.

2 THE COURT: Overruled.

3 THE WITNESS: That is inconsistent with what we
4 talked about in our sessions.

5 BY MS. CALEM:

6 Q. Do you know on how many occasions Ms. Doe actually vomited
7 when she was around her boyfriend?

8 A. I don't know the number.

9 Q. Do you know on how many occasions she restricted her food
10 intake prior to seeing him?

11 A. I don't know the number.

12 Q. This was Ms. Doe's first boyfriend, wasn't it?

13 A. I actually don't know. I don't -- I think it may have
14 been.

15 Q. So she was learning how to negotiate her first romantic
16 relationship, correct?

17 MS. KHOURI: Objection.

18 THE COURT: You may characterize -- in answering, you
19 may characterize it the way you wish.

20 THE WITNESS: And, I'm sorry, can you repeat the
21 question?

22 BY MS. CALEM:

23 Q. Well, yes, certainly. Was she learning how to negotiate
24 her first romantic relationship, in your view?

25 A. I mean, I think, yes. I think that's pretty typical of

1 somebody at that stage of life.

2 Q. And you treat adolescents, a lot of adolescents, don't
3 you?

4 A. I do, yes.

5 Q. Okay. And for adolescents in romantic relationships,
6 aren't there often feelings of possessiveness that arise?

7 A. There can be.

8 Q. And of insecurity?

9 A. There can be.

10 Q. And in teen relationships, these feelings can lead to
11 tension in a relationship, can they not?

12 A. They can.

13 Q. Did Ms. Doe report to you that she and her boyfriend
14 fought a lot?

15 A. She did describe to me some fighting.

16 Q. Did she describe to you feelings of possessiveness on her
17 part?

18 A. Not that I recall.

19 Q. Assuming that she and her boyfriend had frequent fights,
20 might that be a cause of anxiety for her?

21 MS. KHOURI: Objection.

22 THE COURT: She said "assuming." So if you can
23 answer it without speculating, you can go ahead.

24 THE WITNESS: You know, I want to go back. And I
25 don't know that she actually used the word "fighting" with me,

1 but I know that there was, you know, some discord in the
2 relationship. And, you know, it can certainly cause anxiety,
3 but it -- you know, again, I think we need to look at the
4 source of the anxiety separately. It can -- it doesn't have to
5 just be from the discord in the relationship.

6 BY MS. CALEM:

7 Q. If Ms. Doe reported to her peers that she was frequently
8 fighting with this boyfriend, would that provide some insight
9 to you into the dynamics of their relationship?

10 A. I guess I don't understand the question.

11 Q. Well, if you had seen text messages from Ms. Doe to her
12 friends in which she reported frequent fighting, that they were
13 always fighting, would that have helped you in understanding
14 her level of anxiety?

15 A. I think, yeah. I mean, I think anytime there's more
16 information, it's helpful.

17 Q. Did Ms. Doe report to you that she was anxious about the
18 possibility that her high school boyfriend would break up with
19 her?

20 A. I know that we talked about -- she and her boyfriend broke
21 up soon after she and I started meeting, and so we didn't have
22 any lengthy conversations about it, if that was going on.

23 Q. Okay. Is it your understanding that the boyfriend broke
24 up with Ms. Doe?

25 A. I actually don't recall who broke up with whom.

1 Q. If he broke up with her, would that be a source of anxiety
2 for her?

3 A. I think it could be.

4 Q. That is a traumatic event for a teenager, is it not?

5 A. It can be.

6 Q. If -- do you know whether Ms. Doe in the past had
7 responded to situations in which she felt anxiety by vomiting?

8 A. Not to my knowledge.

9 Q. You're not aware one way or the other?

10 A. I have not heard of any that I can recall.

11 Q. If Ms. Doe learned that this boyfriend had been
12 emotionally cheating on her with another girl, could this have
13 been a source of anxiety for her?

14 MS. KHOURI: Objection.

15 THE COURT: Overruled.

16 THE WITNESS: It could.

17 BY MS. CALEM:

18 Q. So with respect to the boyfriend, it's very hard to
19 separate out, isn't it, how much of her distress related to the
20 boyfriend had to do with normal teenage heartache versus the
21 school versus the sexual assault, correct?

22 A. I mean, I think there's pieces of, of all of those things
23 in there, and that's what we worked on is to really kind of
24 piece things apart.

25 Q. And you cannot separate out for us what percentage belongs

1 to which category, can you?

2 A. I can't, no.

3 Q. And the relationship which caused anxiety took place in
4 her senior year of high school, correct?

5 A. That's correct.

6 Q. And concurrently with that relationship, I think -- I
7 believe you testified she was already experiencing anxiety
8 relating to other things in her life?

9 A. That's correct. I want to make sure I understand the
10 context in which I said it.

11 Q. Okay. Well, I withdraw that. I certainly did not mean to
12 characterize your testimony.

13 So my question is, was she experiencing anxiety
14 relating to other issues in her life?

15 A. Yes.

16 THE COURT: What time now? Is it senior year you're
17 talking about?

18 MS. CALEM: Senior year of high school.

19 MS. CALEM:

20 Q. And with respect to Ms. Doe's level of anxiety in general,
21 you don't know her baseline level of anxiety prior to March
22 2017, do you?

23 A. Only, only what she's reported to me, which is that she
24 had generally pretty low anxiety prior to then.

25 Q. And Ms. Doe was a student who pushed herself hard

1 academically, correct?

2 A. That's correct.

3 Q. And she described her parents as having very high
4 expectations of her?

5 A. That's correct.

6 Q. And high-achieving kids with demanding parents often are
7 anxious, aren't they?

8 A. They can --

9 Q. It's not -- I'm sorry.

10 A. I'm sorry. They can be.

11 Q. It's not an unusual phenomenon in Fairfax County, is it?

12 A. That's correct.

13 Q. And in your practice, you see teens with anxiety and
14 eating disorders who have not been sexually assaulted as well,
15 correct?

16 A. Correct.

17 Q. On April 26, 2018, Ms. Doe discussed with you emotions
18 relating to being on her own at college, did she not?

19 A. I don't have it in front of me, but I know that's what we
20 talked about.

21 Q. All right. And this -- that type of anxiety is fairly
22 normal for teens of that age, correct?

23 A. Anxiety about going off to college, being on their own at
24 college, I would say that's pretty normal.

25 Q. And one of Ms. Doe's concerns was how she would function

1 independently when her parents were not around?

2 A. That's correct.

3 Q. And that's a pretty normal concern for that age group as
4 well, correct?

5 A. Yes.

6 Q. And then Ms. Doe also discussed with you issues relating
7 to what her parents wanted for her versus what she wanted for
8 herself?

9 A. We did talk about that, yes.

10 Q. Okay. And is that something that many young people of
11 this age are confronting, that issue?

12 A. A lot of, a lot of adolescents at that age struggle with
13 that.

14 Q. And in May of this year, she discussed with you the
15 frustrations of being at home versus being at college, where
16 she had more freedom; is that right?

17 A. I do recall that conversation, yes.

18 Q. And one of the things that you and Ms. Doe also discussed
19 is her relationships with peers generally, not just romantic
20 relationships, correct?

21 A. Correct.

22 Q. And again, this is not an unusual issue for young adults
23 of this age to grapple with, is it?

24 A. It's not, no.

25 Q. Do you recall a discussion on June 7 of 2018 with Ms. Doe

1955

1 in which she discussed social concerns and beliefs she had
2 about herself and relationships with others?

3 A. I don't recall the exact conversation, but I do know that
4 that's a topic that we discussed.

5 Q. Do you recall doing some role-playing with her as to
6 conversations she might have with peers?

7 A. I do recall us doing role-playing, yes.

8 Q. And what was that about? Just about -- well, what was
9 that about?

10 A. I, I can give you an example. I don't know if it was that
11 particular day. One example that we would do is that she was
12 going to some graduation parties and was feeling just generally
13 anxious being around people that she didn't know, you know,
14 worrying that she wouldn't have anybody to talk to, and so we
15 role-played how she could kind of get into conversations or
16 introduce herself or carry on a conversation, find topics to
17 talk about, things like that.

18 Q. And you would kind of give her some homework, like, you
19 know, your homework is to try to talk to two people you don't
20 know over the next -- until our next session?

21 A. I don't know if I called it homework, but it was
22 encouraging her to, to try to have these conversations.

23 Q. And your notes refer to the fact that you and Ms. Doe
24 worked on interpersonal effectiveness skills. What does that
25 mean?

1 A. Interpersonal effectiveness skills are part of dialectical
2 behavioral therapy. It's -- generally, it talks about how to
3 be in relationship with not only other people, but with one's
4 self, and it's a lot of how to identify what you want, be able
5 to express it, and get those needs met in healthy ways. It's
6 about setting boundaries, being able to say no, being
7 assertive, ways to build and maintain positive relationships.

8 Q. Okay. Do you believe that Ms. Doe gradually made progress
9 in that area?

10 A. I do, yes. Yeah, I think she did great.

11 Q. Can you look at the page numbered 1407 in your notes?

12 A. Okay.

13 Q. That's your notes of August 9, 2018, correct?

14 A. Correct.

15 Q. And your progress notes states: Client has made
16 significant progress in healing from her trauma as well as
17 socially, and she has tools that she can use to continue to
18 grow/heal in both areas.

19 Did you write that?

20 A. Yes.

21 Q. And did you believe that to be true when you wrote it?

22 A. Yes.

23 Q. On August 16, you saw Ms. Doe again. Can you look at the
24 next page, 1408?

25 A. Yes.

1 Q. And there your progress notes states: Client has
2 identified and practiced tools to tolerate, regulate, and
3 manage intense emotions related to school, being social, and
4 trauma.

5 Was that accurate when you wrote it?

6 A. Yes.

7 Q. And it says: Eating and weight stable.

8 Was that accurate?

9 A. Yes.

10 Q. So as of August 2018, Ms. Doe was no longer losing weight?

11 A. That's what I recall.

12 Q. All right. When you are trying to make a differential
13 diagnosis of a patient, litigation in which a patient is
14 seeking emotional distress damages would be a consideration,
15 would it not?

16 MS. KHOURI: Objection.

17 THE COURT: Yeah, sustained.

18 BY MS. CALEM:

19 Q. Did you consider the stress related to litigation as one
20 source of Ms. Doe's anxiety?

21 MS. KHOURI: Objection.

22 THE COURT: Overruled.

23 THE WITNESS: I, I did consider it. I mean, she's
24 human. It's, you know, it's stressful, but I don't think that
25 that was -- it is a consideration, yes.

1 BY MS. CALEM:

2 Q. You don't know what percentage of the whole it is, but it
3 is a consideration, correct?

4 A. Correct. I think it would be for most people.

5 Q. All right. Are you aware of Ms. Doe being on any
6 medication that might affect her mood?

7 A. She is on an antidepressant. I'm sorry, not an
8 antidepressant. She takes an SSRI for the panic disorder.

9 Q. That's, that's a recent development, correct?

10 A. Correct.

11 Q. When you first met with her, you did not see the need to
12 refer her for a consult for medication, correct?

13 A. Not at that time.

14 Q. All right. And was she -- at some point, did she go on
15 some acne medication that had potential ramifications for her
16 mood?

17 A. She did start Accutane the summer before she left for
18 college. I am not an expert on it, but my understanding is
19 that it can cause some mood instability.

20 Q. And do you know if Ms. Doe ever followed up with a medical
21 doctor with regard to mood instability in connection with
22 Accutane?

23 MS. KHOURI: Objection.

24 THE COURT: You may answer the question.

25 THE WITNESS: And you're speaking specifically about

1 therapy; is that right?

2 THE COURT: No, she's asking whether Jane Doe
3 asked -- told you whether she was seeking any medical -- at
4 least this is what I understand the question to be -- separate
5 medical advice from a physician, I would assume, about any mood
6 disorder.

7 THE WITNESS: She -- I mean, she had a physician who
8 she saw who prescribed the medication.

9 BY MS. CALEM:

10 Q. And one thing her parents wanted to talk to you about was
11 the potential impact on her mood of taking -- on her mood of
12 taking Accutane; is that right?

13 A. Correct. Her dad in particular had reached out to me
14 wanting for us to talk about this so that she could make an
15 informed decision.

16 Q. Are you aware of whether or not Accutane affected her
17 mood?

18 A. I am -- I'm not aware.

19 Q. And she started on this medication just before she left
20 for college, correct?

21 A. That's correct.

22 Q. And -- now, you considered and ruled out a diagnosis of
23 post-traumatic stress disorder for Ms. Doe, correct?

24 A. That's correct.

25 Q. And instead, you arrived at adjustment disorder with

1 anxiety?

2 A. Correct.

3 Q. And in order to meet the diagnosis of adjustment disorder,
4 the stressor must have occurred within three months of the
5 onset of the symptoms?

6 A. Correct.

7 Q. And the duration of these symptoms normally is six months
8 according to the diagnostic criteria, correct?

9 A. That's correct.

10 Q. And in this case, you're saying that Ms. Doe's symptoms
11 continued past the six-month mark?

12 A. So I think a couple of things -- that is correct, but I
13 think there are a couple of things going on. If you read more,
14 more into what's written about the diagnosis, there's a part
15 that talks about if a stressor or its consequences persist,
16 then the adjustment disorder can persist.

17 And so we've talked about litigation as being a
18 stressor, and, of course, that's a stressor; however, I think
19 that, you know, through this process, the, the trauma is in the
20 forefront of her mind, and so the, the consequence persists,
21 and therefore, I think the adjustment disorder is valid.

22 And the additional stressors of the boyfriend -- and
23 again, he's not the problem; it's the way in which the symptoms
24 are manifesting in relationship with him -- and also the fact
25 that she was still at school, in an environment that didn't

1 feel as safe to her anymore. You know, she was still in her
2 senior year and still in an environment that didn't actually
3 feel as safe to her as it once did. She was still in band and
4 still among these administrators who she felt let her down.

5 Q. And you're basing this again on her self-report, correct?

6 A. That's correct.

7 Q. You don't know how often she actually even saw these
8 administrators, correct?

9 A. I don't.

10 Q. And the stressors that precipitated the adjustment
11 disorder would have been the sexual assault and the school --
12 the alleged sexual assault and the school's reaction as -- to
13 it as reported by Ms. Doe?

14 A. That's correct.

15 Q. And you cannot apportion out which was the more
16 significant to her, can you?

17 A. I can't say specifically. I know that both were
18 incredibly impactful.

19 Q. And for some people, the assault itself might be more
20 impactful. For others, the follow-up process might be more
21 impactful, correct?

22 A. Right. That's my experience is that, is that even the
23 response can be more traumatic than the actual event, and it --
24 but that's not always the case. It depends on the person.

25 Q. And we really can't say here from -- well, can you say

1 here which portion was more?

2 A. I can't say which one. I just know that both were
3 incredibly impactful.

4 Q. All right. And you concluded that Ms. Doe had some social
5 impairment as a result of the stressors.

6 A. That's correct.

7 Q. Is that accurate?

8 A. Um-hum.

9 Q. You did not conclude that her academic functioning was
10 impaired, did you?

11 A. I did not. She reported to me that she had more
12 difficulty focusing and concentrating, and I also think she's
13 an incredibly driven and high-achieving student and was able to
14 compensate.

15 Q. So as far as you know, her GPA did not suffer from these
16 stressors?

17 A. As far as I know.

18 Q. And as far as you know, her extracurricular activities did
19 not suffer from these stressors?

20 A. Not to my knowledge.

21 Q. So really the area in which you saw impairment was social
22 functioning?

23 A. Social functioning, yes, interpersonally.

24 Q. Interpersonally. You don't believe, do you, that she was
25 impaired in her ability to make connections to people as a

1 general matter?

2 A. I, I do know that, you know, we talked about some of the
3 social anxiety that she has felt throughout the years, so I
4 think, you know, that's a separate issue, but she has
5 experienced some social anxiety.

6 Q. When you say "throughout the years," do you mean even
7 prior to March 2017?

8 A. That's my understanding. That's my -- what I recall.

9 Q. Ms. Doe retains close friends, does she not?

10 A. She does have some close friends, yes.

11 Q. And she is close to her parents, correct?

12 A. Correct.

13 Q. So she has not lost the ability to have close
14 relationships in her life, has she?

15 A. She hasn't lost the ability. I think she's more
16 distrusting.

17 Q. And you can't say, can you, whether that distrust arises
18 more from the assault or the school's conduct, can you?

19 A. I, I think it's both.

20 Q. But you can't apportion, correct?

21 A. I can't give you an exact proportion, no.

22 Q. Now, with respect to this recent panic disorder, this
23 began in May 2019, correct?

24 A. That's when she and I first discussed it, yes.

25 Q. And you cannot explain why Ms. Doe has these new fears,

1 can you?

2 A. It's something that we only recently talked about, and the
3 symptoms were pretty debilitating in the beginning, so we
4 worked a lot on symptom management and getting that part of it
5 under control, and at this point just haven't had enough time
6 to really get at what's underneath of it.

7 I think that over time, I've seen her -- I've seen
8 her anxiety manifest in different ways, and this is just
9 another manifestation, although I don't know precisely what,
10 what the connections are.

11 Q. So you really don't have an answer as to what the cause is
12 now, correct?

13 A. I don't. I know there's a lot of fear for safety, for
14 personal safety. That's something that we've talked a lot
15 about is, like, being fearful for her personal safety and for
16 the safety of others.

17 Q. And some of this related to some, some of the mass
18 shootings that have been happening around the country?

19 A. That's correct.

20 Q. And you cannot attribute these panic disorder symptoms to
21 the School Board's actions with clarity, can you?

22 A. Not at this time.

23 Q. It is possible these new symptoms have an entirely
24 different cause, correct?

25 A. I think it's possible either way.

1 MS. CALEM: Nothing further.

2 THE COURT: Thank you. Redirect?

3 MS. KHOURI: It will be very quick.

4 THE COURT: All right.

5 REDIRECT EXAMINATION

6 BY MS. KHOURI:

7 Q. Ms. Kerley, do you attribute Jane Doe's adjustment
8 disorder to the fact that she is a high-achieving student?

9 A. No.

10 Q. What do you attribute it to?

11 A. I, I attribute her adjustment disorder to her experiences
12 of the trauma of being sexually assaulted and the response that
13 she received from the school.

14 Q. How does Jane Doe's increased ability to cope relate to
15 her actual emotional well-being?

16 A. Currently, you mean?

17 Q. Sure.

18 A. You know, she has worked really hard to learn skills in
19 order to be able to cope effectively, and it doesn't mean that
20 the symptoms aren't there, aren't present anymore. They are
21 still present. They may, you know, decrease/increase at
22 different times, but she's able to -- she has more ways to cope
23 with these skills -- or, excuse me, cope with these symptoms.

24 Q. In your experience, is it a normal reaction of a
25 17-year-old to throw up when she's around her high school

1 boyfriend?

2 A. No.

3 Q. When you first started seeing Jane Doe, that was in March
4 of 2018, right?

5 A. That's correct.

6 Q. And you said the relationship ended soon after that?

7 A. Shortly after that, yes.

8 Q. Around, like, May 2018, was it?

9 A. I would have to look at my notes for sure, but I know it
10 was shortly after.

11 Q. Okay. And you still continue to see signs of Jane Doe's
12 anxiety in your treatment today?

13 A. I do.

14 Q. Despite the fact that now over a year has passed since
15 this relationship?

16 A. That's correct.

17 Q. Okay. Thank you very much.

18 MS. KHOURI: Nothing further.

19 THE COURT: All right. May Ms. Kerley be excused?

20 MS. KHOURI: Yes, Your Honor.

21 THE COURT: All right. Thank you. You're excused.

22 Please don't discuss the testimony you've given here with
23 anyone until our trial is over, all right?

24 THE WITNESS: Okay. Thank you.

25 THE COURT: All right. Thank you. You have a good

1 evening.

2 (Witness excused.)

3 THE COURT: Do you want to play your video clip now?

4 MR. ATES: We would, Your Honor. I hate to be
5 between the jury and them going home. It's sort of somebody
6 standing between me and lunch, and I -- we'll play it as quick
7 as we can, Your Honor.

8 THE COURT: Sure.

9 MR. ATES: And there is a pause in between, and it's
10 going to take maybe a 30-minute pause in between -- 30-minute,
11 Good Lord. 30-second, Your Honor.

12 THE COURT: Okay.

13 MR. ATES: I apologize.

14 THE COURT: All right. So we're going to hear a clip
15 of some deposition testimony of Mr. Baranyk?

16 MR. ATES: Dr. John Banbury, the principal of the
17 school, Your Honor.

18 THE COURT: Yeah. And I think that concludes the
19 evidence in the case, and I'll be releasing you shortly after.

20 Okay. Let's play it.

21 MR. ATES: Thank you, Your Honor.

22 JOHN BANBURY - Video Deposition Excerpt - was played

23 MR. ATES: Thank you.

24 THE COURT: All right. Does that conclude your
25 rebuttal case?

1 MR. ATES: Yes, it does, Your Honor.

2 THE COURT: All right. And we've completed the
3 evidence in the case, and we'll have -- I'll give you final
4 jury instructions and then we'll have closing arguments. It
5 may be necessary for us to go over some last-minute matters in
6 the morning, so how about if we come in at 9:30? Does that
7 work for you-all?

8 (Jurors nodding heads.)

9 THE COURT: Okay. We may get started a little
10 earlier. Hopefully, we'll be ready for the instructions and
11 arguments when you get in at 9:30.

12 So again, it's very important you not do any research
13 or investigation or talk to anybody about the case tonight.
14 And thank you again for your patience, and we'll see you
15 tomorrow morning. You're excused. Thank you.

16 NOTE: At this point, the jury leaves the courtroom;
17 whereupon, the case continues as follows:

18 JURY OUT

19 THE COURT: All right. Mr. Raphael, you wanted to
20 renew -- you wanted to revisit my ruling on the prior
21 consistent statements, and I'll hear you now briefly, sir.

22 MR. RAPHAEL: Thank you, Your Honor.

23 I think that the Court has with regard to the
24 801(d)(1)(B) issue taken the facts in the light most favorable
25 to the plaintiff rather than looking at them as they could be

1 argued the other way. I mean, the --

2 THE COURT: No, I haven't at all.

3 MR. RAPHAEL: All right.

4 THE COURT: I've looked at them as they exist and
5 weighted them all equally.

6 MR. RAPHAEL: I understand. I don't -- I think that
7 the -- I don't -- I think that for purposes of this ruling,
8 it's a factual question as to when she learned of the
9 girlfriend. The plaintiff testified to that after we filed our
10 801(d)(1)(B) papers and made a significant question out of the
11 timing issue, and I noted that during her testimony, she made
12 it -- the question was very careful: Yeah, I told everything
13 to Karoline Davis, and only then did she say: Oh, he has a
14 girlfriend.

15 We played -- we did the clip from her deposition
16 because it's different from how she said it in the deposition.

17 THE COURT: Not particularly.

18 MR. RAPHAEL: Okay. And then the last point I'll
19 make, just to make sure it's clear, is she did -- her, her
20 Friday night text with Aveesh said she was concerned she knew
21 that she could get in trouble, and we think that that does
22 demonstrate that there was a motive to fabricate from the
23 outset, but I don't -- I'm not trying to reargue it.

24 That's what we have on that.

25 THE COURT: Okay.

1 MR. RAPHAEL: I did have three other matters.

2 THE COURT: Yes. All right. I still think that the
3 testimony of Karoline Davis at trial is -- probably also
4 supports Jane Doe, but just the evidence is absolutely clear
5 that the conversations took place, first, about the assault
6 and, second, about the girlfriend, and so -- but your exception
7 is noted.

8 MR. RAPHAEL: Thank you, Your Honor. And
9 anticipating that that would be your ruling, I took the liberty
10 of trying to write up what an instruction might look like, and
11 I haven't shared this yet with anybody. I just got it -- we
12 just got it recently printed.

13 May I hand it up to the Court?

14 THE COURT: Yes, please.

15 MR. RAPHAEL: And it's a variation on the one we
16 submitted, which I think was CCC, and for the -- just for the
17 record, it reads -- it's an instruction on plaintiff's prior
18 consistent statements: You heard testimony from multiple
19 witnesses about what Jane -- it could say Jane Doe -- told them
20 had happened with Jack Smith on the bus on March 8, 2017. For
21 two of those witnesses, Aveesh Kachroo and Victoria Staub, you
22 may consider that testimony for any purpose -- oh, I'm sorry;
23 that's right. That Victoria Staub should be Karoline Davis. I
24 apologize.

25 For two of those witnesses, Aveesh Kachroo and

1 Karoline Davis, you may consider that testimony for any purpose
2 that you find appropriate. For the other witnesses whom Jane
3 Doe told what happened with Jack Smith on the bus, my earlier
4 limiting instruction remains the same; that is, you may not
5 consider that testimony as evidence of what actually happened
6 on the bus, but if you find that the witness's statement of
7 what Jane told that witness was reported to Principal Banbury,
8 Assistant Principal Hogan, or Assistant Principal Taylor, then
9 you may consider that testimony as evidence of what was
10 communicated to the School Board.

11 We think that that's -- in light of the ruling, we
12 think that's a fair -- that will be a fair instruction.

13 THE COURT: Okay. That's got a couple of issues.
14 One is that you don't say that they may consider the testimony
15 for its --

16 MR. RAPHAEL: That's what the any purposes --

17 THE COURT: For any purpose, including the truth of
18 the statement?

19 MR. RAPHAEL: Yeah. The concern we would have with
20 that is like you're saying, you know, consider it as true, and
21 I think this is a more elegant way of saying they can consider
22 it for any purpose.

23 THE COURT: Well, we have other instructions which
24 talk about the way that they can weigh testimony of any witness
25 and give it whatever credibility they think it deserves.

1 MR. RAPHAEL: Yes.

2 THE COURT: So I think we ought to have something in
3 there including its truthfulness.

4 The other issue that I see immediately is that in
5 some of these witnesses' notice testimony, it's hierarchical,
6 that it goes from A to B to C before it gets to the
7 administration. How do we address that in this instruction?

8 MR. RAPHAEL: Well, that was -- I was trying to
9 address that with the last sentence because I think you're
10 right. I think it's only admissible for notice purposes if it,
11 if it got to the people who had to have actual knowledge.

12 THE COURT: Right.

13 MR. RAPHAEL: And so that's why I -- I was trying to
14 address that with the last sentence.

15 THE COURT: Okay. All right, Mr. Ates? You haven't
16 a chance to look at it, but -- and I'll certainly give you time
17 to chew on it.

18 MR. ATES: You honed in on the, on the -- well, first
19 of all, it is Karoline Davis, but on the two issues I picked up
20 on, Your Honor, and I think, I think part of the issue is "was
21 reported." I think it needs to be the concept of ultimately
22 filtered to or ultimately was received by or something. We'll
23 play with that language tonight, Your Honor, but it's getting
24 to the concept of did it get up.

25 And, of course, we've got Ms. Taylor telling

1 Mr. Banbury under -- you know, in testimony that Jane really
2 didn't want to do it. Mr. Banbury denies that, but the jury
3 does have the testimony from which to show not only Taylor knew
4 but that she conveyed it to Banbury.

5 THE COURT: Okay.

6 MR. ATES: So be that as it may.

7 THE COURT: Okay. You work on it tonight, and, you
8 know, send a draft out tonight to counsel and to the --

9 MR. ATES: The, the other issue I think this raises,
10 Your Honor, is Ms. Jorgensen, the mother, she had that clear
11 e-mail going over to the Board -- to the school officials that
12 night.

13 THE COURT: To Mr. V?

14 MR. ATES: To Dr. V, who then reports it through.

15 And so we -- I think they made a hearsay exception at
16 that point, and yet all this 801(d) doesn't go to that
17 specifically, but it does go to notice, and what the School
18 Board -- we need something to show what the School Board knew,
19 and so we're going to be asking for something on that, Your
20 Honor.

21 THE COURT: So I've said it's admissible for purposes
22 of -- all this was admissible for purposes of showing notice --

23 MR. ATES: Correct.

24 THE COURT: -- to the administration.

25 MR. ATES: Correct.

1 THE COURT: And what more do you want out of that?
2 I'm missing the point, I guess.

3 MR. ATES: I'm not being clear, and I apologize.

4 THE COURT: No, it's not -- it's probably not you.
5 Go ahead.

6 MR. ATES: What I'm trying to convey is that it can
7 be considered as notice to the School Board, which seemed to be
8 different than how they were instructed is the point I'm trying
9 to make, Your Honor, upon reflection.

10 THE COURT: Okay. I'm not sure whether that isn't
11 just argument.

12 MR. ATES: An issue of fact. Fair enough. Fair
13 enough.

14 THE COURT: You know, the e-mail is there. I'm not
15 even sure that there's any issue of whether it wasn't said or
16 not. It's just you using the evidence that you have to
17 communicate with the jury, and I'm not sure an instruction is
18 necessary, but you, again, work on it and send something over.

19 MR. ATES: Thank you, Your Honor.

20 THE COURT: Okay. I have a couple of -- well, why
21 don't we finish up with you, Mr. Raphael?

22 MR. RAPHAEL: Thank you, Your Honor. Just briefly,
23 just for the record, we do renew our JMOL at the close of all
24 of the evidence.

25 THE COURT: All right.

1 MR. RAPHAEL: I would add to it at this point that
2 the damage claim for emotional distress is unduly speculative
3 based on the testimony in plaintiff's rebuttal case, where the
4 plaintiff's expert said she couldn't unpack it and say how much
5 was caused by the assault and how much was caused by anything
6 that the school system did or any -- and how much was caused by
7 all of the other stressors.

8 Davis is clear that the School Board is liable only
9 for its own misconduct, and if the expert can't apportion that,
10 there's no reasonable basis on which to allow for damages. So
11 I would add that to our JMOL.

12 THE COURT: All right. Well, I'll deny the JMOL
13 and -- for reasons that I may or may not have said yesterday or
14 the day before, whenever, but, I mean, Ms. Kerley testified
15 that both were incredibly impactful, and I think that's
16 sufficient testimony to get past the JMOL on the damages issue.

17 MR. RAPHAEL: Thank you, Your Honor. The -- it would
18 be helpful -- and I realize the Court has a lot on its plate
19 and you've got other cases. We have pending the question about
20 whether they can recover on a theory of liability for conduct
21 in the senior year --

22 THE COURT: '17-'18.

23 MR. RAPHAEL: -- when they only -- I mean, there are
24 really two pieces of this.

25 One is they only pleaded a single incident. The only

1 thing they pleaded was the bus incident and the response to it,
2 and there's -- we think that the evidence, even if they got
3 past the pleading problem, there's just no evidence they can
4 survive the elements of *Davis* that are required.

5 And in preparing for closing tomorrow, obviously,
6 that's going to be a piece of it. So I don't mean to prod the
7 Court but --

8 THE COURT: No, it's one of my items, and we talked
9 about that a fair amount today, and you've got the elements and
10 the deliberate indifference, and without Jack Smith, you don't
11 have the actor at the school any longer, and -- so on the other
12 hand, you have Dr. V, of course, and he's not an administrator,
13 and I've made that finding, and how, how does this all come
14 together?

15 And then I just listened to the cross-examination of,
16 of Ms. Kerley, and she talked about the stressors and their
17 consequences, and the consequences are what's ongoing, and that
18 that's what -- that's why the normal six-month period of --
19 that is required to recover from this disorder was still
20 ongoing. So how does that factor in it?

21 MR. RAPHAEL: I think -- I take the Court's point. I
22 think there's a distinction between what the damages could be
23 for the violation and what the basis for the violation is.

24 THE COURT: All right.

25 MR. RAPHAEL: And I'm focusing on the second piece,

1 and I think you're focusing on the first piece.

2 THE COURT: I'm really -- I understand you. I'm
3 wondering how the two of them intertwine, or do they
4 intertwine?

5 MR. RAPHAEL: I think they need to be kept separate
6 for two reasons: One, the only basis for liability pleaded is
7 the bus incident. That's the only basis pleaded.

8 No. 2, the only basis on which you could recover on a
9 Title IX theory under *Davis* is if you meet all those elements,
10 and they haven't met any of these elements under *Davis*.

11 Now, if -- the Court's rejected my argument that you
12 should reject the damage theory because she can't unpack it,
13 and I take the Court's point on that. I think that in light of
14 that, they can still argue that the damages were continuing,
15 but if you don't draw the line at the junior year, then we're
16 going to have to be arguing about, okay, was Dr. V's being, you
17 know, in her view curt with her her senior year, is that an
18 independent violation? And that's really not proper and it's
19 really not fair to the School Board.

20 This is my point yesterday, that if you had a
21 Title IX violation in first grade and nothing further, how is a
22 school system supposed to avoid liability for what happens in
23 further years? Under their theory, you would just -- every
24 year would be -- you would have to examine, and that's just not
25 right. No, no funding recipient would be on notice that that's

1 what they're signing up for if they take federal funds.

2 THE COURT: Well, I guess the argument would be they
3 were on notice in 2016-'17, the jury could find, and then that
4 the same stressors continued, and the administration certainly
5 was aware that Dr. V continued on in that position, and is that
6 enough to get you there.

7 MR. RAPHAEL: It's not, because remember *Davis* says
8 that the response by the school system has to be the cause of
9 the harassment or expose the plaintiff to vulnerability, and
10 she -- and it's an objective standard.

11 And so she can't just come in and say: I felt, I
12 felt scared all year. You've got to point to something that
13 the school system did.

14 Because remember, this is a spending law statute.
15 The school has got to know -- it's got to know that there's a
16 problem it has to respond to, and there's zero in the record
17 for her senior year to show that school administrators were on
18 notice of a problem. Anything Dr. V did for that purposes is
19 not -- doesn't count because he wasn't an appropriate person.

20 THE COURT: Well, it appears most of the actions that
21 he took were still during the 2017 spring.

22 MR. RAPHAEL: Well, and they can argue that as the
23 cases come to the Court, yes.

24 THE COURT: Okay. Mr. Ates, your response?

25 MR. ATES: I'd like the Court in its ongoing

1 discussions to talk through the jury confusion issue that may
2 arise if they're instructed you can't find liability, because,
3 honestly, when I read it Sunday night when they shifted over to
4 me, I immediately thought they're trying to cut liability into
5 the prior school year, and I don't -- you know, it, it
6 basically is trying, I believe, to get the Court to say you
7 can't recover for that year, or at least the jury may hear it
8 or read it that way.

9 THE COURT: Well, Mr. Raphael quickly says it's not a
10 damages issue and we're not arguing that you can't consider her
11 mental suffering.

12 MR. ATES: That's Point 1.

13 THE COURT: Okay.

14 MR. ATES: Point 2 is our claim isn't only about the
15 bus event. Our claim -- and the assault that occurred.

16 Our claim is about the school's response.

17 THE COURT: Correct.

18 MR. ATES: And that's what the claim is based on.
19 And it started in March, it continued on, and she is still
20 having to be in the same school with Mr. Baranyk, be in the
21 same school with the other school officials, Hogan and Taylor
22 and Dr. V, throughout that next year, and it is their failure
23 to respond appropriately that continues on, Your Honor, and
24 that's the way we view it.

25 THE COURT: What was the evidence of that, of the --

1 of continued deliberate indifference? Jane Doe's testimony?
2 Tell me. I may be --

3 MR. ATES: My recollection, Your Honor, and I've not
4 read the past couple days, I'll admit, just because of the
5 press of other matters, is Jane Doe is talking about her
6 interactions with Dr. V going into the summer, going through
7 that process, and then going through into the next year, and
8 the fact that he's still over the band, she can't be around
9 him, and she mentioned she left the field one day and had to go
10 sit at the, you know, picnic table, etc.

11 So again, Your Honor, I can't point you chapter and
12 verse on that, but that's my recollection of the testimony, and
13 it's, it's ongoing.

14 THE COURT: There was testimony of that. And when
15 was the -- when were the tryouts for the lead in the Marching
16 Band?

17 MR. ATES: That was June, I believe, maybe into July,
18 Your Honor. And again, I can't do chapter and verse, but it
19 was in that time period going into the next year.

20 Plus, the testimony also was her father is having to
21 travel on these band trips and did it two or three times that
22 next year so that she felt safe, because the school's not doing
23 anything for her on those trips. So it's her parental
24 involvement -- part of the deliberate indifference here, Your
25 Honor, is the parents had to come up with the interim

1 solutions. Her parents had to come up with what the school
2 should have been doing, and into 2017 into 2018, it's her
3 parents solving the problem. Her dad's going on the trip.

4 There was no testimony -- and they had the
5 opportunity to put it on -- that Dr. V tried to do something to
6 alleviate her concerns about safety on those band trips and at
7 band camp, Your Honor.

8 One more point. Part of the claim that we discussed
9 at length, Your Honor, is it has to affect an educational
10 opportunity or benefit, and that educational opportunity or
11 benefit continues to be impacted that next year for the reasons
12 I just articulated. So it is still part of the ongoing claim.

13 THE COURT: Thank you.

14 MR. RAPHAEL: Just very briefly, Your Honor, I -- the
15 focus on Dr. V, I think, shows why this argument can't win. He
16 doesn't count as an appropriate person. So if to her
17 perception he was curt with her or her father had to go on a
18 band trip with Dr. V, where is the evidence of what was known
19 to the new principal and the assistant principals during her
20 senior year? There's zero evidence.

21 Another way -- another way to ask it is --

22 THE COURT: Certainly there's her reaction to Dr. V
23 giving an award to Jack Smith, which created --

24 MR. RAPHAEL: That's junior year.

25 THE COURT: Right.

1 MR. RAPHAEL: I'm talking senior year. Nothing in
2 senior year. There's got to be conduct by the principal or
3 assistant principal her senior year, and they haven't --
4 there's no evidence of that.

5 Everything they've said is, oh, Dr. V, you know,
6 played favorites on a solo. He doesn't count for Title IX
7 purposes. The Court's already ruled on that.

8 THE COURT: Yeah, the issue is whether the conduct is
9 ongoing in the senior year, the same conduct that constituted
10 deliberate indifference.

11 MR. RAPHAEL: And I think if you, if you force them
12 to tell you what it is the school system should have done
13 differently, it sounds like the answer would be, well, Dr. V
14 shouldn't have acted the way he did. And he doesn't count
15 unless you tie it to an administrator who does.

16 And then the last -- you've heard the word
17 "retaliation" a couple times, that Dr. V retaliated against
18 her. They haven't pleaded retaliation.

19 THE COURT: Right.

20 MR. RAPHAEL: That's not -- that should not be an
21 issue in the case.

22 THE COURT: Okay.

23 MR. RAPHAEL: So I think -- I think the answer -- I
24 take the Court's concern that you don't want to cut them off
25 from a proper damages argument, and I don't think they would be

1 if the Court rules as we think it should, that they cannot
2 recover on a liability theory based on conduct by the School
3 Board in her senior year. That is a different question from
4 what her damages are for any misconduct by the School Board her
5 junior year.

6 THE COURT: Okay. Thank you.

7 MR. RAPHAEL: And then I think I told you I had three
8 issues at the outset.

9 THE COURT: Yeah.

10 MR. RAPHAEL: For planning purposes, does the Court
11 have any sense of when you might be able to show us the jury
12 instructions so we don't hold things up tomorrow?

13 THE COURT: Yes. We'll get them to you fairly soon,
14 and that's where I want to go if you're finished with your --

15 MR. RAPHAEL: Yes, Your Honor. Thank you very much.

16 THE COURT: All right. So I didn't rule on a couple
17 of instructions, and the MM is the severe harassment causing
18 systemic effect required and really talking about the
19 educational -- denial of the educational opportunity. And
20 *Davis*, of course, used the words systemic effect, and Mr. Ates
21 pointed out that *Jennings* does not.

22 What *Jennings* does do, on page 699, is explain what
23 it believes *Davis* is saying. And it states: Sexual harassment
24 victim can be said to have been deprived of access to
25 educational opportunities or benefits in several circumstances,

1 including when the harassment, one, results in the physical
2 exclusion of the victim from an educational program or
3 activity; two, so undermines the -- and detracts from the
4 victim's educational experience as to effectively deny her
5 equal access to an institution's resources and opportunities;
6 or three, has a concrete negative effect on the victim's
7 ability to participate in the actual -- in the educational
8 program or activity.

9 And I, I think we should substitute this for MM.
10 Otherwise, they have no definition of what is the effect on
11 the --

12 MR. ATES: We agree with that, Your Honor.

13 THE COURT: Okay.

14 MR. RAPHAEL: I don't think *Jennings* was a single act
15 case, and so it doesn't pick up the systemic requirement from
16 *Davis*, and I think that for that reason, it would be
17 inappropriate to not instruct the jury that a systemic effect
18 is required.

19 THE COURT: Well, I mean, they cite to *Davis*.

20 MR. RAPHAEL: I understand that, but it doesn't -- it
21 certainly doesn't overrule *Davis*. The Fourth Circuit can't do
22 that, and it wasn't a systemic effect single act case.

23 THE COURT: Okay.

24 MR. RAPHAEL: So I don't think that -- I think that's
25 error.

1 THE COURT: Okay. I'll look at it. I'll continue to
2 look at that.

3 MR. RAPHAEL: Thank you.

4 THE COURT: The other instruction that I considered
5 was -- continue to consider was a variation of the instruction
6 that the, the School Board doesn't have to accept any and all
7 types of, of action that they should be required to take after
8 there has been an allegation of, of the harassment, and that
9 there is an instruction which, which I can't find, but which
10 reads -- and I -- and it's attached actually to "deliberate
11 indifference."

12 "Deliberate indifference" means that the defendant's
13 response to the alleged harassment or lack of response was
14 clearly unreasonable in light of the known experiences, and
15 then it goes on to say, but victims do not have a right to
16 particular remedial demands, and school administrators are
17 allowed a certain level of flexibility and discretion in
18 dealing with the discipline of students.

19 So your reaction to that, Mr. Ates? Or -- go ahead,
20 Mr. Raphael.

21 MR. RAPHAEL: Two points. I think the Court in the
22 first sentence read "experiences" when I think it meant
23 "circumstances." "Known circumstances" is the language that's
24 used in *Davis*.

25 And can the Court share the source of that?

1 THE COURT: A jury instruction out of Nashville,
2 Tennessee. And I don't know the name of the case but --

3 THE LAW CLERK: I'll get it.

4 THE COURT: Okay.

5 MR. RAPHAEL: I think that gets -- I think that
6 gets -- I'd like to see it, but I think that sounds, I think
7 that sounds okay.

8 THE COURT: It's better than nothing, right?

9 MR. RAPHAEL: It is a lot better than nothing.

10 And I didn't -- I wasn't fast enough on my feet
11 before. Ms. Rewari correctly points out that on the previous
12 one, you could give both the *Jennings* instruction and ours,
13 because they do address different things.

14 THE COURT: Okay. MM is -- really doesn't even
15 highlight the fact that, you know, we're trying to define what
16 constitutes the deprivation of the educational opportunity.
17 It's a, it's a very confusing instruction to, I think, a lay
18 jury, and that's why I've been seeking something that's --

19 MR. RAPHAEL: Well, I think -- I take your point. I
20 think we cited *Jennings* as support in our -- one of our filings
21 on this, but we have no objection to giving the *Jennings*
22 language that you read. I think that that is correct.

23 But *Jennings*, as I said, was not -- because it was
24 not a systemic effect case and not a single act case, that is
25 an important qualifier. Otherwise, a plaintiff could say, Oh,

1 I missed one class. I lost an educational, you know,
2 opportunity.

3 And that clearly is not what *Davis* contemplates.

4 THE COURT: Okay. Thank you.

5 MR. RAPHAEL: Thank you.

6 THE COURT: Those are the only jury instructions that
7 I recall that we -- that I wanted to discuss, but I'm happy to
8 revisit -- not revisit, not reargue, but tell me that I said I
9 was going to do something and I haven't done it.

10 MR. ATES: I just wanted to respond to Your
11 Honor's --

12 THE COURT: Yes.

13 MR. ATES: -- language from the Nashville case.

14 THE COURT: Yes.

15 MR. ATES: And I think that language may be
16 appropriate, Your Honor, but to my ear, what I think was being
17 left out there is a clause at the end that says: but that does
18 not relieve the school of its Title IX obligations, or
19 something.

20 So in other words, you're telling them a parent can't
21 dictate what to do and they get some leeway, but that
22 doesn't -- whatever I just said, Your Honor.

23 THE COURT: Excuse them from any --

24 MR. ATES: Yeah. That doesn't relieve them of their
25 Title IX obligations, or some words to that effect, Your Honor.

1 So it's a little bit balanced.

2 I believe that's it. I think we're down to the
3 verdict form, Your Honor, which I believe you had reserved on
4 or held, and I'm not sure if we're ready to go there but --

5 THE COURT: Yeah, now's the time.

6 MR. ATES: Okay. We proposed the general verdict
7 form from O'Malley, from the Title IX section of O'Malley. It
8 was relatively straightforward, you know: On this claim of a
9 Title IX violation, who do you find in favor of, plaintiff or
10 defendant? Don't go any further if you find for defendant, but
11 if you find for the plaintiff, what amount of damages?

12 Very simple. Very straightforward. We can show them
13 PowerPoints tomorrow how to fill in the form and we're done.
14 That's what we think needs to be given here. These
15 instructions, you know -- they're going to be instructed, and
16 they can weigh the four prongs and figure out whether plaintiff
17 has proven by a preponderance of the evidence.

18 The one thing that may be missing from that, Your
19 Honor, is the mitigation of damages issue, which is still
20 before Your Honor, and, you know, depending on how that goes,
21 there may need to be a question on that.

22 THE COURT: Okay.

23 MR. ATES: I don't know if you have any questions of
24 me, Your Honor.

25 THE COURT: No, I don't. Thank you.

1 MR. RAPHAEL: At the outset, both parties submitted a
2 proposed special verdict form.

3 THE COURT: Right.

4 MR. RAPHAEL: And we said we agree that a special
5 verdict would be appropriate in this case because there are
6 multiple factual questions that are going -- that the jury
7 needs to decide, and we set them out in our -- we filed a
8 revised form to try to track changes that occurred during the
9 trial, that's ECF 303, and it lays out how the, you know, the
10 facts that the jury needs to decide.

11 The first one is was, was Jane Doe subjected to
12 sexual harassment?

13 The second one is did the -- did Banbury, Taylor, or
14 Hogan have actual knowledge that Smith sexually harassed her?

15 No. 3 is did she prove that they acted with
16 deliberate indifference in response to known harassment?

17 No. 4 is did she prove that she suffered damages?
18 And then that's where the mitigation instruction would come in,
19 whether you give it or not.

20 And then 5 is what -- and we borrowed this from their
21 form -- what sum of money if paid now in cash would fairly and
22 reasonably compensate Jane Doe for the damages, if any, you
23 have found?

24 And that is the logical way for them to analyze it.
25 Both parties at the outset were in agreement that this was an

1 appropriate case for a special verdict, and we think it is.

2 THE COURT: Okay. I'm going to give the special
3 verdict form with the interrogatories. I think it's
4 appropriate. I know that they have the elements of the offense
5 in an earlier instruction, but I think that they could use the
6 extra guidance and it's appropriate in this case.

7 So ECF 303? Is that what you just said?

8 MR. RAPHAEL: Yes, Your Honor.

9 THE COURT: Okay. I'm going to give that.

10 And I'll give you an answer on the -- well, I'm going
11 to give you a copy of -- except I've already lost it -- no, I
12 found it again. Good.

13 I'll give you a copy of this instruction regarding
14 remedial demands and let you take that home with you. And
15 also, if you want, I'll give you the page of the *Jennings* that
16 you can have to look at, and we'll work something up on those
17 instructions ourselves and get you the rest of the instructions
18 tonight. I think you have really -- we can do that, yeah. We
19 can do that before you get to your cars, but not these two.

20 And then to the extent you think I've left something
21 out and/or gone back on something I said I was going to do at
22 8:00 last night, I would not -- don't wait. You know, let us
23 know tonight.

24 I propose that we get together at nine tomorrow
25 morning and hash out any final issues to address in the

1 instructions and allow for formal objections, etc., and that
2 we -- I've taken the last couple years to giving jury
3 instructions before argument. I used to -- that's the way I
4 did it in the state system, and I came here and, of course,
5 it's done the other way, and if Judge Bryant did it the other
6 way, that was the only way to do it.

7 So -- but I will do it either way. Do you want jury
8 instructions first and then argument? That way you can use
9 them to the extent you want to. Okay.

10 MR. ATES: I think that's what we would prefer,
11 although my good friend, Susan Podolsky, would probably
12 disagree given her clerkship, but --

13 THE COURT: He does sit at the right hand of God.

14 (Laughter.)

15 THE COURT: So, okay.

16 MR. ATES: My other question --

17 THE COURT: And he's staring at you right now --
18 well, he's staring at me.

19 (Laughter.)

20 MR. ATES: The other question I had, Your Honor, is
21 does Your -- and I'm not sure what we're planning on, but does
22 Your Honor allow split closing, at least for the plaintiff's
23 side, that one attorney can do the 20 minutes and one attorney
24 can do 10 or whatever?

25 THE COURT: Absolutely, yeah.

1 MR. ATES: Okay. Thank you, Your Honor.

2 THE COURT: How much time do you-all want?

3 MR. ATES: Our gut is 30, Your Honor, but we took
4 about, I don't know, 12 to 15 in the opening, and I think they
5 went about 30-32.

6 THE COURT: Yeah.

7 MR. ATES: So we would just ask if it is a limit,
8 let's try to stay within the limit because we're going to
9 tailor it to whatever the limit may be.

10 THE COURT: Okay. Ms. Rewari?

11 MS. REWARI: Your Honor, I think 30 to 35 minutes
12 should suffice.

13 THE COURT: Okay. That's fine. And I'm not going to
14 fuss over five minutes, but I am going to fuss over, you know,
15 15 or 20 minutes, and so I'll just gently remind you that when
16 you get to about 45 minutes, I'll turn you off.

17 (Laughter.)

18 THE COURT: Okay. All right. What else do we need
19 to discuss tonight?

20 MS. REWARI: Your Honor, are the instructions given
21 in writing to the jury, too, to take back?

22 THE COURT: They are.

23 MS. REWARI: Okay. Thank you.

24 THE COURT: Yeah, I give a couple of copies to them
25 to refer to.

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1 MS. REWARI: And are there any restrictions on terms
2 of using the monitors to show exhibits or demonstratives based
3 on the exhibits?

4 THE COURT: No. They have to have been admitted
5 during the trial. That's it.

6 MS. REWARI: Other than the obvious, yes.

7 THE COURT: Okay.

8 MS. REWARI: Okay. Thank you.

9 MR. ATES: Your Honor, I did not last night get to
10 compare their 303 with what you agreed to give, so I just want
11 to make sure they're marrying up and there's not some language
12 problems there. We want everything parallel.

13 THE COURT: Okay. I agree.

14 MR. ATES: Okay. Thank you.

15 THE COURT: You check that out and let us know if
16 there's a problem.

17 MR. ATES: Thank you, Your Honor.

18 THE COURT: Okay. Then we'll get you copies to take
19 away of this instruction and then send the jury instructions to
20 you, and we'll see you-all tomorrow at 9 a.m.

21 MR. ATES: Thank you, Your Honor.

22 THE COURT: All right, thank you-all.

23 We're in recess.

24 NOTE: At this point the August 6, 2019 portion of
25 the case is concluded.

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CERTIFICATE OF THE REPORTERS

We certify that the foregoing is a correct transcript of
the record of proceedings in the above-entitled matter.

/s/

Norman B. Linnell

/s/

Anneliese J. Thomson